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FEDERAL ADVISORY COMMITTEE ACT AMENDMENTS OF 1989

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 444

TO AMEND THE FEDERAL ADVISORY COMMITTEE ACT

MARCH 15, 1989

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FEDERAL ADVISORY COMMITTEE ACT AMENDMENTS OF 1989

WEDNESDAY, MARCH 15, 1989

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:42 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn (Chairman of the Committee) presiding.

Present: Senators Glenn and Levin.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman GLENN. The hearing will be in order.

I apologize for the late start this morning. Senator Levin and I were both in another meeting we just could not break out of earlier. So we got here just as soon as we could.

Today, the Governmental Affairs Committee will receive testimony concerning S. 444, a bill I recently introduced to amend the Federal Advisory Committee Act, or FACA.

This is a long step down the road. I did not know that Congressman John Monagan was going to be here this morning. He was the original sponsor over in the House of the 1972 Federal Advisory Committee Act. We are glad to have him here this morning, and we are heirs to the work that he started back there a long time ago, I guess.

I am pleased to note that S. 444 was cosponsored by eight other members of the Committee, and I am particularly appreciative of the enormous contribution to the bill from Senator Levin—who is with me here this morning, of course—and his excellent staff. We worked together on this, and he has contributed a tremendous amount to the bill.

Today's hearing continues the work this Committee began in the 100th Congress to monitor and, where necessary, improve the operation and administration of FACA, a 16-year-old law with a simple, single purpose: To regulate those committees, councils, boards, task forces, and similar groups created to provide the Government with expert advice and collective recommendations from the private sector. The Committee's three FACA hearings last Congress demonstrated that there are numerous problems with FACA compliance by both agencies and committees, and that regulatory breakdowns have occurred in the office of GSA's Committee Management Secretariat, which is responsible for government-wide enforcement of the act.

These hearings, along with continuing litigation in the Federal courts over key FACA provisions, provided the impetus for our introduction of S. 444.

For example, the American Bar Association has a case before the Supreme Court. There was a case about whether the National Economic Commission could have closed meetings, and another case over whether the President's AIDS Commission had balanced memberships. Some things like that that have been at issue.

S. 444 is designed to strengthen FACA's management controls and clarify requirements in the law for the establishment, operation and termination of Federal advisory committees. We are especially interested in hearing the comments of our witnesses on those provisions which are intended to clarify the ethics and financial disclosure responsibilities of the President, agency heads, and advisory committee members. President Bush's Commission on Federal Ethics Law Reform recently recommended that in certain circumstances advisory committee members who are Federal employees should have their financial disclosure statements made public. This issue, more than any other, seems to cause the greatest debate within and without the FACA community and deserves our careful consideration.

This hearing will also provide an opportunity to discuss a recent OMB Bulletin on management of advisory committee operations, which has generated some controversy over OMB's motivation and ultimate goals. In my view, during this time when our huge deficit threatens the health of our economy, OMB has a legitimate role to play in monitoring and reigning in the proliferation of Federal advisory committees, and I support OMB's effort in this regard.

It is controversial, however, when OMB gives a mandate for a 25 percent cut. Now, is that the way to go, or should we be considering item by item, issue by issue, committee by committee as to the role they are playing? That is something we have to look into. One is the meat-axe approach; the other does it with an operating scalpel or something, I guess.

Anyway, we are all trying to accomplish the same thing, and that is to make sure that we make the most efficient use of committees, councils, advisory groups that we possibly can.

As I stated upon the introduction of S. 444, several other members of the Committee and I intend to introduce legislation later this year which will seek to terminate advisory committees which have outlived their usefulness. The Committee will work with OMB, GSA, GAO, other congressional committees, and the agencies themselves to identify these advisory committees.

Moreover, I believe OMB is in the best position to ensure that no further regulatory breakdowns occur in GSA's Committee Management Secretariat. At the same time, however, OMB must be careful not to bog down the system with so many paperwork or other requirements that cause the agencies to ignore FACA requirements altogether when they are seeking collective advice from outside experts. The consequences of that development would be very serious. We would return to the situation before FACA was enacted, when Congress did not know how many advisory committees there were, how much they cost, or what they did.

I first came on this Committee some 15 years ago, and that is one of the first things we got into. We identified some 1,650, I think it was, committees, councils, advisory boards and so on, all over Government. It took quite a while to even identify who they were, where they were, what they were. Then we found out a lot of them had been on there. They were on the books; they had their own little budgets. People in for 1 or 2 meetings a year, whatever, even though the committee had long since passed its usefulness.

At that time, after about a 2-year effort, we were able to cut out, as I recall, some 400 and some of that 1,600. I would make clear, though, that we are not trying to cut out all of these advisory committees. We get a lot of good advice from them and at cheaper cost, probably, than hiring the people full-time to do that kind of work. At the same time, we do not want to see them just hang on like an appendage out there some place, not doing anything and wasting taxpayer money.

So we must all work to ensure that the system continues to improve so that the Government receives the best advice possible from groups of outside experts, yet does so in an open, cost-efficient and accountable manner.

There are just a few telling statistics—and I will end after this—concerning how well FACA has served the Government and the public. The actual total committee costs have risen from $25 million in 1972 when the law was enacted to $92 million in 1988. This increase sounds huge; in fact, it just kept ahead of inflation a little bit. During this same time period, on the average, there have been more members per committee holding more meetings per year. The cost per member, when discounted for inflation, has actually decreased over time, from $1,800 to $1,666 if you level out that inflationary difference. On the face of it, then, it appears that we have been getting more expert advice with each dollar spent, but I think we can do a lot better than we have been doing.

So that is a very brief summary before we start our hearing. Senator Levin?

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Mr. Chairman, let me thank you and again congratulate you for taking on a chore which has to be done if we are going to achieve more efficient Government and more open Government, but a chore which is not a particularly glamorous one. You, again, are willing to take on that kind of a task, and it is very much like you to do it, to take this kind of initiative.

As you mentioned, FACA has been in operation now for more than 15 years. We know more about our advisory committees than we did before FACA. We were able to slow down the numbers of advisory committees as a result just of passing FACA. Some of the cost growth was also contained following the passage of FACA.

With all of the improvements that have resulted, there have still been some gaps that have been disclosed and some ambiguities which have become obvious in the statute. That is the purpose of the bill that is before us which you have introduced, Mr. Chairman.

Now, one of the aims of the bill which I just want to focus on for a moment, one of many aims of the bill is to clarify the ethical controls that apply to advisory committee members. Currently, FACA contains only one provision on ethics, which requires agencies to ensure that their committees are not "inappropriately influenced * * * by any special interest." FACA has no specific directives on such matters as financial disclosure, conflicts of interest, or ethical standards. Instead, it relies on individual agencies to determine and inform their advisory committee members of their specific ethical obligations.

The result has been committee members who are ill-informed about their obligations and agency ethics practices which are confusing and inconsistent.

Last year, Mr. Chairman, you held a hearing on advisory committees, in which we looked at the ones that were sponsored by the Strategic Defense Initiative Organization, or SDIO, which is an office inside the Department of Defense. We found, for example, one advisory committee, the so-called Eastport Group, which had failed to file a charter under FACA, whose members had failed to file financial disclosure forms that were required by the DOD, and whose Chairman created at least an appearance of a conflict of interest when he obtained for his employer a non-competitive contract to do the same research which that advisory committee, the Eastport Group, had recommended that the SDIO support. The SDIO admitted providing the Chairman with poor advice on actions which could raise questions of self-dealing or conflicts of interest.

The hearing also discussed a second SDIO advisory committee whose members had either failed to file required disclosure forms or filed them late, and whose forms were not reviewed on a timely basis by SDIO to resolve possible conflicts of interest. As a matter of fact, many members of that committee had potential conflicts due to their associations with other entities performing SDI-related work. SDIO should have counseled them on how to resolve those conflicts before they began work on that advisory committee.

The bill before us would help remedy the confusion and the poor management practices that now characterize the treatment of ethical issues that apply to Federal advisory committees. It would require all advisory committee charters to clarify which categories of committee members are subject to Federal conflict-of-interest rules. It would require all committee members to receive ethics counseling. It would require those members who were special Government employees to disclose in writing, prior to participating in committee business, any financial or other interest which may create a conflict of interest or the appearance of such a conflict. The bill would require the agency's Committee Management Officer to work with the agency Designated Ethics Official to ensure that these ethics counseling and disclosure obligations are carried out in a timely manner.

Hopefully, these new ethics provisions will fill the existing void in FACA and provide some needed guidance and tighter controls on the ethical obligations of advisory committee members. I believe one of our witnesses today in the second panel will be focusing his attention on those provisions, and I hope to get back here in time to hear that testimony in particular, since I have focused on that aspect of this bill.

Again, Mr. Chairman, let me commend you for leading in an area which is a very important area in terms of good Government and open Government. You have taken the time from your schedule to address these FACA problems, and the Nation is very much in your debt for doing so.

Chairman GLENN. Thank you, Senator Levin, very much.

Before we proceed, I have statements by Senator Sasser, Senator Roth, and Senator Heinz, members of this Committee who could not attend today's hearing. They will be inserted at this point in the record.

[The statements referred to follow:]

OPENING STATEMENT OF SENATOR SASSER

Mr. Chairman, let me join you this morning in welcoming the witnesses who are appearing to testify about Senate bill 444, the Federal Advisory Committee Amendments Act of 1989.

I'd like also to congratulate you, Mr. Chairman, for your perseverance and foresight in reintroducing this legislation. As you know, I was pleased to join you and seven other members of this Committee in co-sponsoring S. 444.

This bill follows up last year's bill, S. 2721, which was the subject of a very constructive hearing before this committee last October. The suggestions which emerged from that hearing have been incorporated, to a significant extent, in S. 444. As a result, I believe our bill will accomplish some salutary reforms in the way Federal advisory committees are formed, overseen, and terminated when their objectives have been met.

One of the problems that has been identified with respect to advisory committees is their sheer number. There are now about 1,000 such committees, and the General Accounting Office reports that as many of 100 of these advisory committees could be eliminated. In some cases, they have already achieved their goal and continue to exist because their authorization has not expired yet.

So I am concerned, with many of my colleagues, about the total annual cost of Federal advisory committees, about 93 million dollars. I look forward to the input and cooperation of the General Services Administration, and the Office of Management and Budget, about the best way to go about "sunsetting" unnecessary committees. At the same time, I am concerned that these committees be evaluated on their true merits—that there not be artificial quotas set for agencies to meet in eliminating committees. I will be interested to hear some discussion of that issue by our witnesses today, if possible.

Our bill, for example, would permit executive agencies themselves to terminate Federal advisory committees, including those created by congressional mandate, upon giving 180 days' notice to the authorizing congressional committee. But the six-month notice provision should suffice to allow Congress the time to reauthorize an advisory committee when appropriate.

Another issue is that of balance in membership and viewpoints represented on advisory committees. Our bill will require preparation and publication of criteria for achieving balance at the time when the proposal for an advisory committee is drawn up, and again at several stages in its formation and operation. I believe this will enhance public confidence in the work and findings of these committees. I understand, though, that opinions may differ about the proper emphasis on balance with respect to some of the more technical and scientific advisory committees. We welcome any constructive suggestions we may receive today and in weeks to come, as the Senate considers this legislation.

I expect we will also hear useful testimony this morning about reporting requirements of agencies and advisory committees, including the adequacy of information about potential ethical and conflict-of-interest problems. I would agree with those who say that we should not deter capable and public-spirited individuals from serving on these committees, by the imposition of burdensome reporting requirements. But again, we must squarely address and resolve any outstanding ethics issues, if the public is to have confidence in the quality and impartiality of the work performed by advisory committees.

Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR ROTH

Mr. Chairman, since the enactment of the Federal Advisory Committee Act (FACA), we have witnessed significant improvements in management controls over the advisory committee system.

We have come a long way since those days before 1972 when we didn't even know how many advisory committees existed, how much the committees cost, or what business was being conducted. No single federal entity had responsibility for tracking the formation, operation, or termination of advisory committees. Advisory committee meetings were not subject to public participation or notification requirements.

FACA was intended to address these concerns and, as one of the original cosponsors of the Act, I take pride in the strides we have made to date in imposing order on the system.

During the same period of time, we have become sensitive to the fact that some problems remain. Questions about interpretation and implementation of several provisions of the Act have been raised and they need to be resolved.

The measure on which we will focus today, S. 444, is intended to address many of these remaining problems. I am pleased to be a cosponsor of this measure, Mr. Chairman, and I want to take this occasion to express my appreciation to you and to Senator Levin for your diligent efforts with respect to the legislation.

I continue to believe that advisory committees can and do contribute substantially to effective federal policymaking. In order to assure the future viability of the advisory committee system, it is apparent that statutory changes are necessary. Both you, Mr. Chairman, and Senator Levin are to be congratulated for your persistence and hard work in this area.

As I indicated in my statement accompanying the introduction of S. 444, Mr. Chairman, I continue to be frustrated by our inability to effectively halt the proliferation of unnecessary and duplicative advisory committees. This was a concern before FACA was enacted, and it remains a concern today.

S. 444 responds to this concern by authorizing agencies to terminate statutorily-established committees prior to their scheduled termination dates after providing notice to the authorizing committees—a provision I wholeheartedly endorse. I firmly believe we need to redouble our efforts to keep the number of committees to the minimum necessary. Our problem, among others, will be finding an acceptable definition of "minimum necessary."

I look forward to hearing the thoughts of our witnesses this morning about the provisions of S. 444 and how best to limit the proliferation of advisory committees. I also look forward, Mr. Chairman, to cooperating with you on legislation to terminate advisory committees that have outlived their usefulness. Again, Mr. Chairman, I congratulate you for holding this hearing, and I join you in welcoming our witnesses.

OPENING STATEMENT OF SENATOR HEINZ

Mr. Chairman, as the ranking minority member of the Governmental Affairs Subcommittee with General Services Administration oversight and a cosponsor of your legislation, S. 444, I want to thank you for giving us another opportunity to examine ways to improve the organization and functioning of Federal advisory committees. Your leadership on the issue, and the hard work of your staff, are to be commended.

The nature of Federal advisory committees today is substantially different from that before Federal advisory committee amendments were initially enacted 16-and-a-half years ago. Back then, Congress saw a need to establish means to monitor and oversee these advisory committees, whose number, finances, and membership went unreported and were thus subject to uninformed speculation. Even more troubling, the ethical standing of these Federal advisory committees was also questioned as pubic access and notice of committee business were not mandated. The irony was plain—the interested public often couldn't even find out about the activities of a committee supposedly representing their views to the Federal Government!

Well, Federal advisory committees have come a long way since their closed-door past, and Federal policymaking today wouldn't be the same without the input of their members. But the need for such out-of-Government advice should be couched in terms of fiscal, and intellectual, pragmatism—we can't have "FAC's" mushrooming up around the country for every issue under the sun—we have to be realistically selective. This hearing should give us some guidelines for that selectivity.

Last year alone, 58 departments and agencies were advised by more than 1,000 committees composed of some 21,000 members. It is my understanding that Mr.

Plager, here today on behalf of the Office of Management and Budget, will testify about, among other things, OMB's December bulletin recommending the elimination of a quarter of extant FAC's. This testimony should help us formulate an Omnibus Advisory Committee Termination Act.

In addition, I look forward to OMB's further monitoring of the need for and status of certain advisory committees. I know that we in Congress have only the best intentions in mind when we create a given advisory committee—one to promote public participation in groundwater management and protection in my groundwater legislation, S. 362, springs to mind—but, once out of our hands, we need GSA's and OMB's help to ensure their efficient functioning.

Finally, I look forward to hearing more from our panel of experts about GSA's and OMB's developing relationship, and about how each envisions their respective roles in the future.

Thank you, Mr. Chairman.

Chairman GLENN. Our first panel this morning, the first of two panels we will have, Mr. S. Jay Plager, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget; Paul T. Weiss, Associate Administrator for Administration, General Services Administration, accompanied by James Dean, Director, Committee Management Secretariat, General Services Administration.

Gentlemen, we welcome you this morning and look forward to your testimony. Your entire statements will be included in the record, and if you wish to give an abridged version, that would be welcome so that we have as much time as possible for questions. In either event, your entire statement will be in the record.

Mr. Plager, if you would lead off this morning, please.

TESTIMONY OF S. JAY PLAGER, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. PLAGER. Thank you, Mr. Chairman.

I appreciate the opportunity to testify today on issues affecting Federal advisory committees. With your permission, I would like to summarize briefly what I have laid out in more detail in my prepared statement,[1] and thus provide greater opportunity for you to ask questions if you wish. Since I appeared before this Committee last October, a considerable amount of progress has been made improving the management and operation of Federal advisory committees.

At that time, the Committee expressed concern about a number of areas. You had before you a report from the General Accounting Office about deficiencies in the committee management practices of the agencies and of the General Services Administration. You were considering ways to strengthen the provisions of the Federal Advisory Committee Act to ensure that committee recommendations are arrived at in an open manner, free from inappropriate influences. You were concerned about issues of ethics and conflict of interest, and you were concerned that some agencies had been deficient in ensuring that advisory mechanisms subject to the act were, in fact, operated in a manner consistent with the act, issues that both you and Senator Levin have already addressed this morning.

In my testimony last October, I reviewed the work of the President's Council on Management Improvement relating to advisory committees. I noted that we continued to view GSA as the appropriate place to implement the oversight of committee management. In my discussion of the bill you introduced in the last Congress, S. 2721, I applauded the positive steps proposed for the elimination of statutorily created committees that had completed their work. I endorsed the bill's definition of the term "meeting."

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[1] See p. 72.

At the same time, I expressed certain concerns about the way the bill treated the issues of balanced membership and conflict of interest disclosure, and the way it might create undue burdens on the abilities of agency heads and of the President to seek advice through advisory committees.

Since that time, Mr. Chairman, we have been working with GSA, the agencies, the GAO, and this Committee to improve the oversight of advisory committee operations. GSA has published a notice of proposed rulemaking that would clarify provisions in its rules covering ethics, reporting and membership. OMB, as has been noted, has issued Bulletin No. 89-08, "Improved Management of Federal Advisory Committee Operations." And you, Mr. Chairman, with several distinguished colleagues, have introduced a new bill, S. 444, which clearly reflects your efforts to incorporate many of the suggestions you have received on S. 2721. Agencies find advisory committees an important source of advice and expertise, and I think we all share the goal of improving the quality and management of these committees without imposing unnecessary burdens on their operation.

Let me comment briefly on activities in the committee management area and then make a few comments on the new bill, S. 444.

We greatly appreciate the support that this Committee and its staff have provided us in the committee management area. The letters from the Committee leadership to OMB Director Darman and to agency heads confirming our joint efforts to develop a bill to eliminate committees whose work had been completed should encourage agencies to terminate these committees. We look forward to continuing this joint project.

One of the major actions we have taken in the committee management area is the issuance of OMB Bulletin No. 89-08. This bulletin requests agencies to provide us with information about terminations and cost reductions. Pursuant to your request, we will be glad to send you the agency responses as soon as they are in.

Chairman GLENN. I would like to have those. Good.

Mr. PLAGER. Yes, sir. Since today is the due date, that hopefully will be soon.

Your invitation letter asked several specific questions concerning committee management. In my written testimony, I have provided detailed answers. If there are any that you wish to discuss in particular, I will be glad to respond.

Turning now to the bill, S. 444, my comments are going to be necessarily general, Mr. Chairman, as we do not yet have a fully developed Administration position on this bill. Let me assure you that we are interested in working with you to arrive at a bill that will take advantage of the 16 years of experience under the Federal Advisory Committee Act, and improve it where there is a demonstrated need for improvement.

In evaluating proposed revisions, I suggest the following criteria: First, do the revisions to the act promote the efficient use of advisory committees? That is, do the revisions encourage fruitful discussion between Federal officials and members of the public, and at the same time avoid creating needless impediments to that discussion?

Second, do the revisions serve to clarify areas which have been the subject of misunderstanding or disagreement, particularly if they cause unnecessary litigation?

Third, are statutory changes truly required, or would administrative action suffice?

Committee management is an important focus of S. 444. As we did with S. 2721, we continue to support several of the bill's initiatives in this area, including the provision that will allow the President or an agency head to terminate a statutorily created committee after giving the Congress adequate notice.

An important area addressed in the bill is ethics, as commented upon by Senator Levin. Advisory committees are, in one sense, unique Federal entities. In a number of cases, their members by definition have a "conflict of interest." Members are often selected precisely because they have real stakes in the committee's work, that is, that of their employer or of the interest group that they represent.

I applaud the bill's emphasis on maintaining the distinction between members who are Federal employees and other members, and on providing counseling for all members on Federal ethics rules and conflict-of-interest statutes.

Before making a final assessment of what needs to be done here, we should examine the recommendations of the President's Ethics Commission, which issued its report just last Friday.

In addition to ethics, may I comment on two other provisions? As I state in detail in my written testimony, Mr. Chairman, we support the Committee's approach to clarification of the term "meeting." There does appear to be some possibility for confusion in the present drafting, and I have made some suggestions in my statement on how the language might be improved.

Finally, I want to comment on an area that has been a subject of considerable discussion; that is, balanced membership. We think it prudent to be particularly cautious in this area for three reasons. The first is the wide range of committees that any definition must cover, and the difficulty of interpreting the words "fairly balanced" as they apply to membership on narrowly technical committees.

The second reason is that we want to avoid language that will create misunderstanding or disagreement or generate unneeded litigation. We do not want to lose sight of our objective: to get the committees established so that the public is able to take advantage of the opportunity to participate in the committee's deliberations.

Our third reason for caution is linked to the second. As I stated earlier, we want to be sure that any changes we make support the economic and efficient use of advisory committees and that we do not create unnecessary impediments to their establishment.

In brief, we agree with the bill's intent to clarify the statutory treatment of balanced membership, but not with the mechanism it proposes.

The bill makes a valuable change by stating, as a matter of policy, that the concept of balanced membership must be understood in the context of the functions to be performed by the committee. We find this linkage valuable and important.

The bill, however, then goes on to create a 2-stage process involving the development of factors to be considered and plans for achieving balance. Instead of focusing on the membership and getting on with the work of the committee, we are concerned that under the proposed approach, we will find ourselves arguing over whether or not the stated factors appear to be sufficient to produce balance, and whether or not the plan is fully consistent with the factors.

Mr. Chairman, we believe the aphorism that the proof of the pudding is in the eating applies with particular force here. That is a variant on the "duck theory." If a committee's membership is not fairly balanced, then corrective action is appropriate. The procedures set up in GSA's proposed rule capture the requirement for a plan to achieve balance and provide opportunity to develop the record of the agency's intent. The rule establishes a process wherein "a description of the agency's plan to obtain balanced membership" is included in the agency head's letter to the administrator of GSA and is published in a public notice. We believe this process will lead to the balanced membership we all desire.

In conclusion, Mr. Chairman, we look forward to continuing to work with the Committee to make significant improvements in the operation and management of Federal advisory committees. We appreciate your letters of support for this effort and the cooperation of your staff and of the GAO. As you stated when you introduced this legislation, this Committee has held a number of important hearings on the question of managing and controlling Federal advisory committees, beginning in 1976. These hearings have served to focus much needed attention on the imperfections in the system and have developed a record which provides a sound foundation for amending the act. As a result, the time is ripe for a bill to be reported that will improve the Advisory Committee Act. I have indicated our initial thoughts on portions of the present bill this morning. We are committed to working closely with you and your staff to ensure that the bill is one that we can wholeheartedly support.

Thank you.

Chairman GLENN. Fine. Thank you very much, Mr. Plager. I would only add on the duck theory that when Mr. Darman was before us for his confirmation hearings, the duck theory was, indeed, hatched from the very chair in which you now sit. [Laughter.]

Mr. Weiss, go ahead.

TESTIMONY OF PAUL T. WEISS, ASSOCIATE ADMINISTRATOR FOR ADMINISTRATION, GENERAL SERVICES ADMINISTRATION, ACCOMPANIED BY JAMES L. DEAN, DIRECTOR, COMMITTEE MANAGEMENT SECRETARIAT

Mr. WEISS. Thank you, Mr. Chairman. I hope I will not rest on those laurels.

Thank you for the opportunity to testify today on S. 444, the Federal Advisory Committee Act Amendments of 1989, and other matters related to the management of Federal advisory committees.

As you mentioned earlier, accompanying me today is James Dean, the Director of GSA's Committee Management Secretariat.

My remarks will summarize my prepared statement, which I request be entered into the record.[1]

Chairman GLENN. It will be entered in the record in its entirety.

Mr. WEISS. Thank you, sir.

Mr. Chairman, our remarks before the Committee on October 5, 1988, included comments on S. 2721's provisions relating to the definition of an advisory committee; questions regarding what constituted a "meeting" under the act; suggestions for clarifying the act's "balanced" membership requirements; concerns over the coverage of advisory committee members under applicable Federal ethics statutes; and several options for improving the act's administration. With regard to the latter, we supported the Committee's proposed amendment to permit cyclical, rather than annual, reviews of committee accomplishments; endorsed improvements in the maintenance of committee records and the reduction of certain reporting requirements; supported an exemption for State employees acting in their official capacities; and, perhaps most importantly, underscored the significance of the proposed bill's focus on reducing the number of Federal advisory committees created by statute.

I am pleased to note that S. 444, with limited exceptions, maintains the overall management thrust contained in the previous bill.

We believe S. 444 would be improved through the adoption of several changes detailed in our full testimony. We also concur with those improvements offered by OMB in its testimony. In the interest of time, I will defer my remarks on these issues if it is agreeable to the Committee.

Chairman GLENN. That will be fine.

Mr. WEISS. Mr. Chairman, in your invitation to appear before the Committee today, you asked for a status report on GSA's efforts to implement recommendations resulting from the General Accounting Office's October 1988 review of the Committee Management Secretariat. As you will recall, GAO offered several constructive comments relating to the establishment and renewal of advisory committees; the preparation of the Annual Report of the President on Federal Advisory Committees; the conduct of the Annual Comprehensive Review; and the provision of follow-up reports on the recommendations made by presidential advisory committees, as required by Section 6(b) of FACA.

I am very pleased to note that we have made substantial progress in addressing each of GAO's recommendations. Specifically, the Committee Management Secretariat has completed the first phase of its efforts to design standard forms for use in conjunction with the establishment and renewal of advisory committees. A similar form has been designed for use in completing the Annual Comprehensive Review. Both will be tested following interagency review. Copies of each form have been provided to your staff for their comments.

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[1] See p. 80.

Standardized consultation and reporting formats will help GSA and sponsoring organizations assure that each of the Act's requirements is addressed. At the same time, we expect that their use will assist in actually decreasing the amount of time required to process required documentation.

Secondly, actions taken by GSA during fiscal year 1988 to streamline the production of the Annual Report of the President on Federal Advisory Committees have definitely paid off. The fiscal year 1988 report was completed by GSA on December 15, 1988, and transmitted by the President to Congress on January 3, 1989. This achievement represents a major improvement over past performance, and we fully expect to meet the schedule established by Congress into the future.

Third, the Committee Management Secretariat staff has been increased to include five full-time professionals, two part-time professionals, and two temporary part-time clerical support positions. This staffing level has resulted in more resources being directed toward each area identified by GAO for improvement.

One of these new professional slots is specifically directed at conducting, managing, and overseeing the Annual Comprehensive Review mandated by Section 7(b) of the act. This year's effort, covering the results of committee activities undertaken during fiscal year 1988 is under way. We anticipate the issuance of a report to the President and the Congress during May of this year, which will specifically outline the results of our review, including recommendations for the termination of advisory committees. This year's effort will be coordinated with the Office of Management and Budget as part of the process specified by OMB Bulletin 89-08.

Our report on the Annual Comprehensive Review will also include the type of analytical data earlier requested by Congress as part of the President's Annual Report on Federal Advisory Committees. As indicated during the first part of our testimony, we believe specific management recommendations should be developed as part of the Annual Comprehensive Review in order to maximize their impact.

GSA published a notice of proposed rulemaking on December 30, 1988, to address FACA's requirement for follow-up reports on the activities of presidential advisory committees. This action also addressed the committee's concern regarding the implementation of FACA's balanced membership provisions.

The Committee Management Secretariat is in the process of drafting a final rule incorporating these changes. The Secretariat is also in the process of notifying all departments and agencies of overdue reports and tracking their responses to completion.

Mr. Chairman, you also asked that we provide our thoughts on the proper role of the Office of Management and Budget with regard to the Annual Comprehensive Review of Federal advisory committees. You also asked for our opinion with respect to OMB Bulletin 89-08 and steps which should be taken to assure the procedures stated therein do not result in higher consultant costs or undue delays in processing committee consultations.

With regard to OMB Bulletin 89-08, relating to the "Improved Management of Federal Advisory Committee Operations," which was issued on December 23, 1988, this issuance is directed toward implementing many of the recommendations developed by the President's Council on Management Improvement as part of its 1988 Review of Federal Advisory Committee Management. At the same time, the bulletin addresses the need to control committee costs through the identification of inactive and/or obsolete committees, as well as those groups which are performing low priority functions.

GSA supports the management objectives outlined in this bulletin. At the same time, however, we view the process established by the issuance as a bridge toward the full implementation of FACA's requirement for an Annual Comprehensive Review performed by GSA. As stated earlier in this testimony, GSA is fully committed to this function.

While the approach embodied in the bulletin is primarily directed at reducing the number and the costs of advisory committees, GSA's parallel effort will also review existing committees from a qualitative perspective. The final results of both efforts will be closely coordinated to assure that the resulting reductions and management improvements do not produce undesirable secondary outcomes, such as unnecessary increases in consultant costs. In addition, the results of this joint effort will be continuously monitored by GSA to assure implementation of accepted recommendations.

An important part of GSA's and OMB's activities in this area will be to assure that related decisionmaking processes are properly synchronized with FACA. As we mentioned during our previous remarks before the committee, it is important that we approach the act's requirements from a systemic perspective. Together, GSA and OMB can tap each other's expertise and resources to make sure this happens.

GSA fully recognizes OMB's role with regard to government-wide management and budgetary issues. As one of the Executive Branch's Central Management Agencies, we work closely, and I believe effectively, with OMB in carrying out many initiatives of interest to GSA. Our intention is to work closely with OMB on implementing the bulletin. We will also maintain an open dialogue with their staff regarding the effectiveness of the issuance as Federal agencies gain actual experience with its requirements.

As recommended by the President's Council on Management Improvement, GSA will vigorously pursue efforts to strengthen ties with OMB's budget and management staffs. We welcome their assistance in identifying opportunities for further management improvements, including the termination of inactive or low priority advisory committees. While GSA will remain accountable for accomplishing FACA's objectives, OMB is viewed as a valuable and reliable partner in implementing the act on a consistent basis.

GSA and OMB's relationship relative to the act's implementation and other management initiatives will be outlined in greater detail in the plan currently under joint development to implement Bulletin 89-08. The plan, which will include detailed guidance to Federal agencies on the issuance, will be coordinated through GSA's Interagency Committee on Federal Advisory Committee Management. It also will be shared with the Senate Committee on Governmental Affairs.

Mr. Chairman, this concludes my remarks. I will be pleased to address any questions the committee may have.

Chairman GLENN. Thank you. I appreciate that. I appreciate hearing your views on how you think this cooperative effort will go with OMB. I hope it works just as you indicate.

As you are also aware, I think—certainly Mr. Darman is—we are interested in putting some "M" back into OMB. Mr. Miller, when he was Director of OMB, after he left the job, indicated he thought the "M" might stand for moribund or something like that. Because the "M" part that was put back in when the law was changed—it changed from Bureau of Budget to OMB—was supposed to mean that OMB took a more management-oriented role than they had in the past. So we are glad that you are moving to be more active in this area.

To a specific, OMB has taken the position that the Executive Branch does not need its current 1,000 advisory committees and has suggested the three agencies with over half of the government's total—HHS, Interior, and National Science Foundation—should set goals to eliminate over 25 percent of their committees.

I do not know whether that was done after some study or whether it was done intuitively, that we would shoot for 25 percent just off the top of our head because 1,000 committees sounded like an awful lot. Either way, what has been the reaction in the agencies to OMB's position?

Mr. PLAGER. Well, first, Mr. Chairman, with regard to that number, there is no real magic in that number, and we did not intend it to have any real magic. The stating of the number was really a way to bring home to the agencies the growth that has occurred in recent years in this advisory committee world, and the need to really address the question of do we need all of those committees.

We certainly do not consider that number cast in concrete. We intend to look at each committee on its merits.

Chairman GLENN. Okay. Well, that is good. Do they agree with your assessment that they might be able to cut out 25 percent?

Mr. PLAGER. They have not responded in those terms, Mr. Chairman. We are, in fact, waiting now to get their reports; as I noted in my opening statement, today is the due date to hear from them. It is clear, though, that 3 of these agencies have over half of all the advisory committees. Unless they cooperate and respond, there is not enough left in the others to really make an impact. That was part of the message that we simply wanted to send to the agencies, that we are serious about this. We think your committee is serious about this, and we want the agencies to be serious about this.

Chairman GLENN. We are serious about anything that costs the Government $100 million a year. We are up to $92 million for fiscal year 1988. It will be $100 million by the end of the year, I presume. Anything that is that big an expenditure is important to OMB and important to all of us.

Mr. PLAGER. Yes, sir.

Chairman GLENN. I do not know whether you have the details on this enough right now to answer this question, but how many of the advisory committees at HHS and NSF consist of peer review panels charged with evaluating research proposals? Do you have any figures on those?

Mr. PLAGER. I think there may be some data in this last report. Let me ask the staff who are with me today.

I am advised by the people who really know that we do not have that split immediately available, but we would be glad to try to work it out.

Chairman GLENN. If you could give us any estimate on that, we would appreciate it.

Mr. PLAGER. Yes, sir.

Chairman GLENN. Thank you.

Mr. PLAGER. We will certainly do that.

Chairman GLENN. You have given all these agencies until today, March 15th—I guess they look at it as the Ides of March for real—to identify those advisory committees that have outlived their usefulness or could be continued with fewer resources. How can you force compliance with this? Do you have any enforcing mechanism? What is your mandate in law that gives you authority? Do we need to alter the law to give you some authority in that area?

Mr. PLAGER. Well, Mr. Chairman, there is sometimes a certain amount of reluctance on the part of agencies to respond to yet another requirement. And we appreciate that. We understand it.

At the same time, our experience has been that when the agency's attention is called to something that they know they must respond to, they will respond. And they will respond correctly and usefully. It may take 1 or 2 passes to get it quite right.

We do not have any doubt that we are in a position to impose that requirement and to get the responses that you and I would both want to get, and we are going to share those responses with you. And if you and your staff think that some of them fall short, you can be sure you will have our support in backing them up.

Chairman GLENN. Well, OMB of all places in Government has the power of the purse strings, which does wondrous things, sometimes, in convincing people to be cooperative.

Mr. PLAGER. I have heard that said, sir. Yes.

Chairman GLENN. You object to the bill's provisions which would force the appointing authority—whether it be Congress, the President, or the agency head—to set forth in writing criteria used to achieve balanced membership on a committee, because you feel it would generate more litigation. Now, this balanced membership thing has been a problem for us, as you are well aware.

This bill's approach is simply to force documentation of the selection process which in my view, would make litigation less likely. Are you also opposed to a documentation requirement?

Mr. PLAGER. No, sir. If I have left you with that impression, I have mis-spoken. Let me be very clear.

The Committee's and OMB's view on this are not actually very far apart. We are not opposed to documentation, and, indeed, we support the draft proposal that GSA has come up with in that NPRM which requires documentation in the form of a plan, a description of a plan for how this balanced membership is to be brought about.

I think it important that there be a record, that the agency be compelled to state its intention, and that record be put before the public. And, indeed, the GSA NPRM calls for the publication of a public notice containing that. So we really are quite close.

The concern that I was trying to express was simply with having a set, a series of articulated process steps which then get everybody focused on the process steps rather than on the overall event of bringing about balanced membership. We should have a plan. The agency should articulate that plan, and we should test the membership against that and against the basic criteria which your draft statute puts out and which we applaud.

Chairman GLENN. Mr. Berg's study of ethics issues indicates that agencies find there is little reason from their point of view or the members' to classify the member as a special Government employee, which then triggers the financial disclosure requirements under the bill. If we are to continue to ask the agencies to make this distinction, how can we assure it will be done properly?

Mr. PLAGER. I am aware generally of Mr. Berg's study, and in general terms, we think retaining the classification of Federal employees, special Federal employees, and others is probably a useful set of categories for purposes of financial disclosure. I am not in a position right now to say exactly what we ought to do with each of those categories. As I indicated, we really want to look at the Ethics Commission's report and have some conversations with you and your staff about how to fit all that together.

Chairman GLENN. All right. In our bill, we leave it up to the appointing authority to determine whether the financial disclosure information from committee members who are special Government employees should be kept confidential or made public. The President's Ethics Commission recently called for mandatory public disclosure in certain circumstances. That is where a committee member has been granted a waiver from the criminal conflict-of-interest laws. What do you think of that recommendation?

Mr. PLAGER. Again, Mr. Chairman, there are 26 others, in addition to that one, included in the report, and I think we should look at all 27 of those recommendations and be sure that what we come up with for the advisory committees makes sense for them and for the overall Government-wide approach to this ethics issue.

Chairman GLENN. FACA coverage now extends to all "agencies." Do you think the law should be expanded to cover the advisory committees sponsored by other federally funded entities? As an example, we partially fund the Postal Service with compensation revenue foregone. Amtrak, Corporation for Public Broadcasting, Legal Services Corporation: they are funded with Government money. Should we expand the scope of this thing to cover those entities also?

Mr. PLAGER. My view on that, Mr. Chairman, would be that all Federal agencies ought to be covered by FACA. These are important safeguards for public participation in the Federal Government's work.

Chairman GLENN. These are not technically listed as agencies.

Mr. PLAGER. Well, we need to look at exactly the definition of what we mean. I am not sure federally funded may be broad enough. We may want to deal with agencies that may or may not be called federally funded, depending upon how they fit.

I would respond to the basic proposition affirmatively; yes, FACA should cover as broad a range of Federal agencies as is sensibly defined. Whether that should be by Federal funding or other definitions, I think we should work on that.

Chairman GLENN. I guess we have listing somewhere of the funds that go into these others. I do not have a list of them here this morning, but that may be one that if you have readily available, we would like to have for our Committee record also on these that are not covered, these other separate organizations.

Mr. PLAGER. All right, sir. We will certainly work with you on that.

Chairman GLENN. There may be more, too. Perhaps we can work with staff on that. Was that meant to be a complete list or just a partial?

STAFF. Just a partial.

Chairman GLENN. Okay. If there are others like that, too, that should be included on this list, give us information on those, also.

Mr. PLAGER. All right, sir.

Chairman GLENN. Thank you.

Mr. Weiss, FACA defines advisory committees as those committees which are established or utilized by a President or agency head. Although FACA itself does not include the definition of "utilized," GSA defines that term in its regulations. Do you believe the concept that a utilized committee is adequately defined by GSA and understood by those who must implement this law?

Mr. WEISS. The simple answer is yes, I believe it is. We view utilized committees, as we do any other committee covered by FACA, and we communicate that to the agencies. If any questions arise as to a particular committee, if it is utilized committee, whether it falls in the definition of FACA, our answer is yes, it does, and all the rules apply.

Chairman GLENN. What is your position on the proposed new exemption for committees that are mixed committees: that are composed of State or local Government employees acting in their official capacities, who are required by law to meet with Federal officers? How are we handling those? What is your position on the exemption that the bill would give those people?

Mr. WEISS. Well, originally, I believe in testimony we gave earlier, we were in support of exempting those committees from coverage by FACA. We currently are deliberating with OMB in the Interagency Committee to see if that is a proper role for us to take vis-a-vis those committees. We will have to report back to you later on the consensus.

Chairman GLENN. Okay. I would like to know how that is working out. Because I know we felt that if you have a governor that has to come in and meet with somebody, then if he is part of that committee or group, then does he have to go through all the financial disclosure and all the hoop-de-do just to have a meeting with a Federal official some place? That is a little bit ridiculous. But I would like to know how it is working out.

Mr. WEISS. Okay. We will report back to you, sir.

Chairman GLENN. All right. Good.

Does FACA now require that all members of a committee's subcommittees or sub-groups be drawn from the parent committee?

Mr. **Weiss**. The answer is yes. If there is a subcommittee of a committee that is chartered under FACA, we view all the rules of FACA applying to that subcommittee. Now, if that subcommittee in turn acts independently of the parent committee, then we would view it as a new committee, requiring the full chartering procedures that would apply to any other committee.

Chairman **Glenn**. And you presume, then, that these subcommittees would report back to the full committee? The reason I am asking this, we get back to this fairly balanced question. If you had a subcommittee operating independently, it could be skewed pretty well over toward one end or the other, or whatever spectrum you are talking about with the issue involved. But if it has to report back through the full committee, I think that would probably take care of your fairly balanced requirement, even though you had hoped that each sub-group would also make an effort to do their own balancing act there.

Mr. **Weiss**. That is correct. That is our perception of it as well.

Chairman **Glenn**. Does FACA require that each subcommittee or sub-group file a charter justifying its existence?

Mr. **Weiss**. No, not necessarily. I believe only when acting independently.

Mr. **Dean**. That is correct.

Chairman **Glenn**. If they are acting independently?

Mr. **Dean**. Yes.

Chairman **Glenn**. And they would have to be given authority to act independently by the parent committee; is that it?

Mr. **Dean**. The current FACA does not go as far as the proposed bill of saying they have to be specifically empowered. Of course, as a matter of practicality, they are told to go do something. They only require a charter if they are going to be reporting back directly to a Federal official, without going back through the parent committee.

Chairman **Glenn**. Okay. I do not think people are out trying to thwart the system at every turn in all their meetings. But it could be used as a way of sort of thwarting the balancing and also the mission of the parent committee.

Mr. **Weiss**. It could be. It could be done innocently, through ignorance.

Chairman **Glenn**. So that is one I think we ought to look at also. Okay, thank you. Mr. Dean, you have made one comment here. Do you have any other comments you wanted to add?

Mr. **Dean**. No. I think I will quit while I am ahead.

Chairman **Glenn**. Good. Thank you all very much. We will get on to the second panel here. We may have additional questions from other members of the Committee that we would submit to you. We would appreciate an early reply so we can include them in the record.

Mr. **Plager**. Thank you, Mr. Chairman.

Mr. **Weiss**. Thank you, Mr. Chairman.

Chairman **Glenn**. Thank you very much.

The second panel is Mr. Brian C. Murphy, Chairman, Select Committee on FACA, Federal Bar Association of Washington; Mr.

Richard K. Berg, Senior Counsel, Multinational Legal Services, Washington, D.C., and former General Counsel of the Administrative Conference of the United States; and Mr. Henry M. Jasny, Center for Auto Safety, Washington, D.C.

Gentlemen, we welcome you this morning. Mr. Murphy, if you would lead off, we would appreciate your comments. Your entire statements, all of you, will be included in the record. We welcome an abridged version for your comments, but the entire statements will be included in the record. Mr. Murphy?

TESTIMONY OF BRIAN C. MURPHY, CHAIRMAN, SELECT COMMITTEE ON FACA, FEDERAL BAR ASSOCIATION, WASHINGTON, DC [1]

Mr. MURPHY. Good morning, and thank you, Mr. Chairman.

On behalf of the Select Committee on the Federal Advisory Committee Act of the Federal Bar Association, I thank you very much for giving me the opportunity to appear before you again today. In accordance with your letter of invitation, I shall direct my comments to S. 444, the Federal Advisory Committee Act Amendments of 1989; to OMB's recent Bulletin 89-08, and to the appropriate relationship OMB should have with GSA on advisory committee matters; as well as to OMB's announced goal of reducing the number and costs of advisory committees.

As I noted in our testimony October 5, 1988 before this Committee, the Federal Bar Select Committee is a very diverse group made up of attorneys, committee management professionals, and other persons who have had extensive experience with Federal advisory committee matters. When the Select Committee was established by the Federal Bar Association, a decision was made to strive for a balance of viewpoints. For better or worse, Mr. Chairman, I am afraid you will hear that diversity reflected today in some of these remarks.

In fact, some members of the Select Committee, I am sure, will wish to supplement this statement with their own individual written comments, especially in view of the fact that many of our members felt the need for more time to carefully review S. 444, as it so well deserves. For example, Select Committee Vice Chairperson Michael Cardozo, who has previously testified before this Committee on FACA, has an insightful separate statement dealing with "utilized" committees. That, of course, is something you asked about in your questions, sir.

If I may, I would like to turn to the provisions of S. 444. At the outset, I would like to note that, although in our testimony I shall offer specific suggestions as to particular provisions and language, several members of the Select Committee on FACA have concerns broadly regarding S. 444. These include the definition of "subcommittee"; the application of FACA to "utilized" committees; and certain chartering issues. Not all our members agree on every one of these points, but they do largely represent areas of consensus. Of course, we would be pleased and very much welcome the chance to work with your very capable staff to clarify any of our positions and to assist in any way that you deem appropriate.

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[1] See p. 85 for Mr. Murphy's prepared statement.

First, with regard to the local, State, Federal relationship exemption that you have proposed, this was an exemption that the Select Committee advocated in our testimony last October. Many of us very much welcome it. As you know, Mr. Henry Jasny of the Center for Auto Safety, who has been a very active participant in the Federal Bar Select Committee and who is testifying today, takes strong exception to this exemption, simply indicating that reasonable people differ on this point.

Many of the members of the Select Committee, however, do welcome this exemption as the resolution of a very practical problem—that of the great need felt by many Federal agencies to conduct business and to consult with State and local Government officials. In fact, many members of our Select Committee urge that the exemption be broadened to exclude such meetings, whether or not they are required by statute.

I would like to turn to the definition of "subcommittee." The definition of "subcommittee" reflects suggestions made by the FBA Select Committee in our testimony last October, and we very much appreciate that. We are concerned, however, about the breadth of the current definition, as it would extend coverage of all the requirements to FACA to every subcommittee. It is our view that it is not necessary to apply the chartering requirements in FACA to every single subcommittee. In particular, we would suggest that chartering requirements not be applied to subcommittees that report through a parent advisory committee that would itself be subject to full FACA coverage.

Mr. Chairman, we are also concerned that the definition of "subcommittee" not change the current interpretation in GSA's regulations that meetings of subcommittee members be exempted when they are for the purpose of gathering information, conducting research or drafting proposed position papers for the full committee. We are somewhat concerned that the formulation of subcommittee in S. 444 might negate GSA's ability to carve out such a very practical exemption.

Turning to the definition of "meeting," speaking personally, Mr. Chairman, and not necessarily for the Select Committee, I believe that the definition of "meeting" is a very useful formulation which will help discourage abusive practices.

With regard to the problem of utilized committees that was discussed a few minutes ago, we feel that the use of the term "utilized" throughout the bill may cause considerable difficulties. As a practical matter, some Federal agencies call upon groups that were pre-existing, and which were not established expressly to advise an agency. In many cases, such groups have hundreds of members, many of whom may attend only one meeting during the year, while others from the group may attend at other times, with the agency not knowing in advance who will attend each meeting.

For example, a practical problem occurs in the situation where we have a designated Federal official in your proposal required to attend the meetings of an advisory committee and to chair the meetings when the involved agency head so determines. It may be very difficult for that agency head or the designated Federal official to know when the committee meeting is being held.

Beyond this, since a group formed in a university or other private setting that is not established by an agency is not identified as a committee under FACA until it is utilized by the Federal agency, there may be no way that these provisions can be followed until the work of the group has progressed, possibly to completion. Thus, we feel that the very special challenges presented by utilized committees should be addressed specifically in this bill. This is especially true in the context of the disclosure requirements proposed in S. 444.

I would like to talk about those ethics issues and the issue of fair balance, if I may, for a moment. We certainly welcome the reference to Federal ethics rules and conflict-of-interest statutes. The Select Committee hopes that it will have the opportunity to discuss our recommendations as to the specific boundaries of appropriate disclosure of potential or actual conflicts of interest. Clearly, these are important issues. In fairness, I could not sit before you today, sir, and delineate with great precision a consensus view. We would like the opportunity to weigh this very carefully in light of today's testimony and to discuss our views with your very capable staff.

Mr. Chairman, with regard to the issue of balanced representation, again, the Select Committee hopes that it may be possible to delineate very clearly defined standards for achieving balanced representation. We have some specific ideas about this. We would like to discuss them among ourselves, and then in turn share them with the members of your staff.

A number of our members are also concerned about the interrelationship between FACA, the first of the openness in Government statutes, and the Sunshine Act. This is in the context of the protection of records. Proposed Section 12(c)(1) of S. 444 requires working papers and drafts to be made available for public inspection and copying at the time the records are distributed to the advisory committee members. In the view of many of our members, this is likely to impose a very substantial paperwork burden on Federal agencies which we feel may outweigh the benefits of immediate public access to the drafts and working papers.

I think it is important to remember, too, that these working papers are not final position papers, and there should be an opportunity, we believe, for Committee review prior to the release to the public, lest these positions be mistaken for the viewpoints of the Committee. Really, we are talking about a practical problem here. I do not think anybody in our group wants to deny the public access. We are concerned that, if one brings 50 copies of a document to the meeting and 150 members of the public show up, will we be subject to a lawsuit? We are also concerned, as I just mentioned, about the fact that many of these do not represent final committee positions.

Mr. Chairman, I would be remiss if I did not point out, as Mr. Plager did, that we are particularly pleased with the authority that you have granted in proposed Section 9 to the President or an agency head to abolish advisory committees that are established by statute. We consider this to be a most helpful step in assuring appropriate executive control over the costs and usage of advisory committees.

As I said, sir, we would be very pleased to elaborate on any of these points. We understand that there is likely to be legislation in this area, and we are very delighted, indeed, to have a chance to express our views about the proposed provisions.

We were asked to provide our views about the OMB Bulletin 89-08 and the relationship between OMB and GSA. With regard to OMB Bulletin 89-08, the Select Committee understands that OMB will review, under this bulletin, prior to establishment, any advisory committee proposed by a department or agency in the Executive Branch for consistency with the President's policy and management objectives. This review is to include the mission, duration, status of implementation, funding, and personnel levels of each proposed advisory committee.

Frankly, the Select Committee is concerned about OMB's determination to become involved again, as it once was, in the review of advisory committee budgets and in committee establishments, renewals and terminations. I hope I am not speaking out of school here, sir, but some 8 or 9 years ago, I worked at OMB conducting a review of FACA. I had the chance to talk at that time to a number of budget examiners who are very, very busy persons and very capable persons. It was very clear to me then, sir, that budget examiners often do not place a very high priority on advisory committee matters. They are at the bottom of the in-box.

Now, we know Mr. Plager in his statement has indicated the commitment of OMB to avoid delays in chartering, re-establishment and so forth in the OMB involvement in the process, and we welcome that. We are, however, concerned because sometimes it did take several months to complete the consultation process in the past when OMB was involved.

We understand that some agencies circumvented the act to avoid the red-tape obstacles connected with chartering through the GSA/OMB consultation process. Currently, we understand that GSA operates its consultation process in a highly streamlined way, and GAO has pointed out that, in the overwhelming majority of cases, these consultations are completed within 15 days. We would certainly not want to see any sacrifice to that speedy record.

We are also concerned about the requirement in OMB Bulletin 89-08 that GSA develop a system of quarterly reports on operating activities, appointments and organizational matters relating to the establishment, continuation, renewal, or re-establishment of advisory committees. This is not a requirement that is imposed by FACA, and it will, in our view, be highly resource-intensive and costly to taxpayers without bringing commensurate benefits.

Former Congressman John Monagan, who, I am delighted to see, is with us today, and who introduced the bill in the House of Representatives that eventually became FACA, seemed to be speaking about these kinds of problems when he commented, at a Federal Bar Association educational program on FACA, that,

> I abhor the idea that this legislation [FACA] may be used * * * to delay government action, that a branch of the Executive may use it to hold up action which another branch thinks is desirable. That certainly is far from the objective of stimulating economy and efficiency in government.

For all these reasons, the Federal Bar Select Committee on FACA respectfully urges the Committee to support a streamlined consultation process.

Sir, I would like to add as a personal note that I have had the pleasure of a number of personal consultations with OMB careerists who will be involved in the 89-08 process, and I believe they understand our concerns and the need not to produce a result that delays chartering re-establishments. I take some comfort in that.

Finally, you have asked us to address OMB's goal of reducing the numbers and costs of advisory committees. It is hard for me to improve, sir, on some of your own points, but let me express our views.

You are referring to OMB's suggestion, I presume, that three agencies with the largest number of advisory committees—Health and Human Services, Interior, and the National Science Foundation—should establish senior level task forces that have goals to eliminate over 25 percent of their committees. Frankly, Mr. Chairman, we are puzzled by what seems to be a meat-cleaver approach.

We have seen this before. We thought we had gone beyond this now, but perhaps we have not, although I do take comfort in Mr. Plager's statement that numbers alone are not the criterion. The fact is that OMB has written that numbers are a criterion.

Chairman **GLENN**. I was concerned about that, too, and I was glad to hear his statement on that: that it was not as a result of any study. It was a goal. They thought they ought to set some goal, and so they did, and it will be an item-by-item type approach to it, I think was basically what he said.

Mr. **MURPHY**. Well, sir, I think that is necessary. I do not know why they put it in writing, and it caused some of us some distress that they did.

Obviously, sir, we agree with you that we are strongly opposed to an across-the-board reduction in the numbers of advisory committees. While we, of course, do not assert that all advisory committees are worthy of retention indefinitely, we feel that any decision—as Mr. Plager suggested today—on the advisability of retaining or eliminating advisory committees should be made on a case-by-case, common-sense basis.

As you know, I am sure, groups such as the Kettering Foundation, in its report on "The Utilization and Management of Federal Advisory Committees," have found advisory committees to be highly cost-effective vehicles for providing Government officials with expert guidance and advice, usually at a fraction of what private consultants cost. The meat-cleaver approach is not cost effective.

Finally, we agree with you, Mr. Chairman, that "the story of the Federal Advisory Committee Act is not contained in the number of committees or their costs or the numbers of people involved." You have identified a very real problem in your expressed concern about the replacement of these advisory committees with higher-priced individual consultants. The only certain way to avoid that likely hazard is to nullify the suggested across-the-board reduction.

Mr. Chairman, we have covered a lot of ground here, and I know we have not always been clear. But it has been a privilege to testify, and we certainly do look forward to the chance to work with your colleagues and your staff.

Thank you very much.

Chairman GLENN. Thank you very much.

Before we go on to Mr. Berg, just let me make a comment. This Committee has been probably one of the prime movers in pushing OMB to be more active in the "M" part of OMB, as I said earlier. The law was changed to provide that function for them back some years ago, and it has been our observation through the years, as the Committee of oversight, that there was not a whole lot done in that "M" area. Then Mr. Miller highlighted this, as a matter of fact, in some public statements after he left his position, that the "M" was not really in there, was not operating.

I do not look at OMB as being some supra-IG out there, ferreting out everything and setting up a new huge several-hundred people staff just for that function. I do, however, think that OMB, if it was a corporation, would be a comptroller, if you will. They would be there to try and see what is efficient, coordinate things. OMB is the point where all the budget figures for Government finally come together, and they have to really wrestle with this thing here and make sure that it is all working properly.

I look at them as almost—I will not say a surrogate for this Committee, but you could put it that way in that our mandate is efficiencies in the organizational aspects of Government across the board. We tramp on all committees' toes around here on a regular basis by getting into what they view as their turf. But we are looking into efficiencies in organization and that sort of thing.

I look at OMB as doing the same thing in trying to tailor these things, make it more efficient, and that is where everything comes together at one spot. And so it seemed to me that it was logical that they perform sort of the comptrollership function for Government, rather than having somebody else do it separately. So that is my personal view of it. Other Committee members might express themselves differently.

Mr. MURPHY. Mr. Chairman, that is hard to disagree with in concept, and I would certainly hope that Mr. Plager is correct in his written statement that there will be no delays here. There were in the past, and we look to today and not the past.

Chairman GLENN. Yes. But whether OMB can do that or not is going to be dependent on all these different agencies getting their lists of committees to OMB promptly so OMB can do this item-by-item analysis on it, so that it is not a meat-cleaver approach.

Mr. Berg, welcome to our hearing this morning. We look forward to your statement.

TESTIMONY OF RICHARD K. BERG, SENIOR COUNSEL, MULTINATIONAL LEGAL SERVICES, P.C., WASHINGTON, DC, AND CONSULTANT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES [1]

Mr. BERG. Thank you, Senator.

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[1] See p. 107 for Mr. Berg's prepared statement.

I am grateful to the Committee for the opportunity to testify here today. My name is Richard K. Berg. I am a lawyer in private practice in Washington, but I was with the Federal Government for over 20 years; and for the 16 years up to 1987, I was Executive Secretary and General Counsel of the Administrative Conference of the United States. I was also the committee management officer and the designated agency ethics official.

I have been engaged as a consultant to the Conference to prepare a study on the conflict-of-interest problems with respect to Federal advisory committees. I have submitted a draft report which your Committee staff has seen and which has been circulated, and that is the principal reason I have been asked to testify today.[1]

I want to emphasize that the report is a draft report, which has not been adopted or approved by the Conference or any body of the Conference. And the views I am expressing today are my own and not necessarily those of the Conference.

The problem of conflict-of-interest requirements for advisory committees involves the interaction of three distinct bodies of law: the Federal Advisory Committee Act, the Federal conflict-of-interest laws, particularly 18 U.S.C., Chapter 11, and the Federal personnel statutes and regulations. None of these schemes was designed specifically or primarily to deal with conflict-of-interest standards for members of Federal advisory committees. Many of the problems that we have seen and will be discussing arise from the fact that this is simply not an area which has been one of primary focus.

In my prepared statement, I sketch out generally the coverage of the conflict-of-interest laws and their interaction with FACA. I want to skip rapidly over this analysis, except to point out that, by far, the most significant of the conflict-of-interest provisions for members of advisory committees is 18 U.S.C., Section 208, which makes it a criminal offense for a Federal employee to participate personally and substantially through decision, recommendation, the rendering of advice, et cetera, in any particular matter in which to his knowledge he, a member of his immediate family, or any organization for which he works or in which he is an officer has a financial interest.

This is a very broad prohibition, and it has been traditionally very broadly interpreted by the Department of Justice. It is not limited to matters involving specific parties but covers substantially any action or decision by a Federal agency which might have a direct impact on a private entity.

Because of the breadth of the statute, Section 208 does have provision for waivers, which the employing agency is authorized to grant, either generally by rule or in specific cases. I will return later in my testimony to the question of the waiver procedure.

To sum up the situation briefly, the conflict-of-interest laws and certain administratively imposed financial disclosure requirements apply to some advisory committee members and not to others. They apply to those committee members who are deemed special Government employees but not to members who are deemed representatives or independent contractors, or who otherwise for any reason do not meet the definition in the personnel statutes of a Federal employee.

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[1] See p. 122.

Let me say, at this point, I am excluding from consideration those advisory committee members who are full-time Federal employees. We are only talking about people who are primarily outside the Government.

The distinctions among advisory committee members were not created by FACA. They stem from Federal personnel law and have been recognized since at least 1962. They are discussed at considerable length in a 1982 memorandum from J. Jackson Walter, who was then head of the Office of Government Ethics, and this memorandum is the principal guidance to the agencies on the classification problem.

Briefly stated, the applicable rule is that advisers who are selected in their individual capacities are special Government employees; whereas, those who are selected to participate "in a representative capacity to speak for firms or an industry, or for any other recognizable group of persons, including on occasion the public at large," are treated as representatives who are expected to speak for their constituencies, and, thus, are not Government employees.

There are several additional categories of members of advisory committees. Some members are viewed as independent contractors. The distinction between employees and independent contractors is based on common law principles and turns primarily on the degree of control by the employer. It is a very useful distinction in determining questions of tort liability, workmen's compensation, etc.; it has some impact under the Internal Revenue Code; but it has little or nothing to do with the question of conflict of interest.

Finally, some committee members, however they might otherwise be viewed in terms of the distinction between special Government employees and representatives, are not SGE's because they have not been appointed in the civil service within the meaning of the personnel statute. In this category would be members of privately established "utilized" committees and members of informally assembled committees which are on the borderline of FACA coverage, which may or may not have been chartered, and where the procedures followed by the agency do not amount to an appointment in the civil service.

However, there are only two distinctions here that really matter. If a committee member is an SGE, he is subject to the conflict-of-interest statute, the financial disclosure requirements, as well as a number of other statutes, including the Hatch Act. If he is not an SGE, for whatever reason, he is subject to none of these.

The Advisory Committee Act covers a very broad range of situations and relationships, and it is not surprising that distinctions must be made. However, there are two points which must strike an observer.

First, the operative distinctions seem primarily conclusory and almost invariably questions of degree. Take, for example, the distinction—crucial for purposes of conflict-of-interest coverage—between a member selected as an individual and one selected as a representative. There are undoubtedly situations in which an agency is primarily interested in ascertaining the views of a defined industry or other interest group from which the member is selected. Some statutes establishing advisory committees specifically state the representative character of the membership: Members shall be selected in this way, and some shall be from this group and some others from another group.

But agencies can generally obtain industry views on an issue without establishing an advisory committee. One would assume that in many situations what the agency is looking for is just the kind of borderline or hybrid situation the conflict-of-interest laws appear to rule out. That is to say, the honest judgment of someone who is forced to weigh his perception of the common good against the narrower interests or biases of the constituency from which he is selected.

One might well ask: If what is desired from the member is a mere expression of the industry or constituency view, why have him work on a committee? Committee work assumes a certain interchange of ideas and a certain openness to persuasion on the part of the members.

Of course, the agency can resolve the problems on the legal level simply by classifying the members as representatives, while hoping that in practice they can rise above mere representation. In fact, there is good reason to believe that is exactly what is happening. But it does seem to me, at least, that the either/or classification called for by the Federal Personnel Manual and the Walter Memorandum oversimplifies what is likely to be a spectrum of situations and a mix of motives on the part of all the participants.

One result of the difficult in classifying committee members is that the question of compensation; that is, whether or not the member receives pay in addition to any reimbursement of expenses, tends to become determinative. An uncompensated adviser may be an SGE, but a compensated adviser must be an SGE. The Federal Personnel Manual states flatly that "[a] person who receives pay from the Government for his services * * * is its employee and not a representative of an outside group." The only qualification on that is that there are a number of statutes—I found at least two—that state specifically that members shall receive pay but shall not be treated as employees. Otherwise, if an agency desires to compensate a committee member, he must be treated as an SGE, even if his role on the committee is to "balance" the views of members who are serving as representatives of special interests.

While the question of compensation should doubtless be relevant in determining the classification of an adviser, I am not sure that a flat rule is desirable. Presumably, the agency benefits from the advice received from persons acting in a representative role or capacity. Why should the agency be forbidden to pay for this service?

Second, aside from the difficulties of applying the distinctions, there is the troubling question whether they make any sense in terms of the problem of conflicts of interest. At least with respect to committees rendering policy advice, neither SGE's nor non-SGE's are expected to bring to the deliberations total objectivity. That is why they are there. That is why we seek balance. Conversely, classifying a member of a committee as a representative, or as an independent contractor, does not eliminate the danger of self-serving advice or alleviate the need for some disclosure to the agency of the conflicting interest.

I mentioned earlier the possibility of waivers under Section 208. These do offer an avenue of relief, and the waiver process is used, at least in some agencies. However, there appear to be a number of drawbacks:

Some agencies, notably the Department of Defense, are extremely reluctant to issue Section 208 waivers. This has been told to me by three different people from the Department of Defense. A flat policy of no waivers may increase the pressure on the mid-level officials who are responsible for organizing the advisory committees to find ways to avoid classifying their members as SGE's. This may be part of the explanation for the situation which the Committee found with respect to certain scientific advisory groups.

Another problem is that there is some doubt expressed as to whether a Section 208(b) waiver may be granted where the financial interest in question is not insubstantial in itself, but the agency concludes that any bias arising from that interest may be offset through committee balance or, perhaps, discounted by the agency after the appropriate disclosure. Because of these doubts, the President's Commission on Federal Ethics Law Reform has recommended an amendment to Section 208, expanding the bases for granting exemptions.

I am not certain that such an amendment is necessary. The administrative construction of Section 208 over the years, as reflected in the Federal Personnel Manual and the opinions of the Office of Legal Counsel at the Department of Justice, has interpreted the waiver authority fairly broadly. It may be that the particular problem addressed by the Commission can be solved simply through greater agency awareness of the law in this area. But this is a possible problem which should be borne in mind.

Another difficulty with the waiver process is that it does not always run smoothly. The Committee had brought to its attention by the GAO report the situation of the AIDS Commission, where members were appointed and brought together on the basis of their backgrounds and contacts in the health services area. After the advisory committee had held several meetings, it suddenly occurred to somebody that there may be a conflict of interest problem, primarily by virtue of this broad interpretation which the Department of Justice gives to 208. And I am not saying the interpretation is wrong, but, at any rate, it is broad. It raised the possibility that at some point the AIDS Commission members might have a conflict of interest with respect to their recommendations. So after several meetings were held, waivers were fairly hastily arranged. But, in the meantime, the members had been exposed, all unknowingly, to possible criminal liability.

A fourth problem with waivers is that they tend to be limited in scope and place the burden on the member to anticipate potential conflicts outside that scope. I quote in my prepared statement from a sample waiver letter that was supplied to me by the ethics officer in one of the departments. It more or less parallels the Federal Personnel Manual, grants the member a waiver with respect to matters of broad policy and general applicability, withholds a waiver with respect to matters which have "a direct, predictable, and unique effect on your financial interests or the interests of others related to you," and then leaves it to the member to figure out whether he has got enough protection.

If I were that member's lawyer, I do not think I would advise him to participate under such a limited waiver.

Finally, the waiver process addresses only the Section 208 problem, which admittedly, I think, is the worst problem, but it is not the only one. There is the Hatch Act problem; there is a thoroughly obscure problem involving the Foreign Agents Registration Act. There are a number of discrete problems arising from calling these people special Government employees.

To learn how the agencies are administering the distinctions laid out in the Walter Memorandum, I relied very heavily on the agency reports which were supplied to this Committee in response to the questionnaire sent out about a year ago. I examined roughly 25 agency responses and supplemented this with interviews of agency officials. My preliminary conclusions are summed up in my report.

Briefly, they are that the agencies tend, by and large, to classify all or nearly all their advisory committee members either as representatives or as special Government employees. Thus, the Department of Health and Human Services, the agency with the most committees and the most members, reports that all its advisory committee members—outside of full-time employees, of course—are special Government employees. The Department of the Interior, which I understand has the next most committees, classifies practically none of its committee members as SGE's. They are all representatives. Education calls their members SGE's. Transportation calls their members representatives.

There may be differences in the situations, I recognize, but this sort of heavy weighting one way or the other seems to suggest that agencies are answering the same question in different ways.

I found at least two situations where members should clearly have been classified as SGE's under the guidelines of the Walter Memorandum and were classified as representatives, frankly for reasons of administrative convenience. I suspect there are considerably more.

I have summarized the draft report, and my principal conclusion is that the present distinctions among advisory committee members are extremely fine, difficult to administer consistently, and, in any event, cannot be justified in terms of protecting the Government from self-interested advice. In practice, they result in agencies requiring too little disclosure from the members who are not SGE's, while imposing significant burdens, principally potential criminal liability, on those members who are SGE's.

The Special Committee on Government Ethics of the Administrative Conference is now considering a report and recommendations, and I hesitate to speak very freely about its work because it really has not made up its mind yet. My own proposal is for a basically uniform disclosure requirement for all advisory committee members, possibly patterned on that which was formerly in effect under Executive Order 11222. (In fact, it is still de facto, in effect, even though the Executive Order provision itself has been withdrawn.) There is some disagreement within the Special Committee as to whether the disclosure or elements of this disclosure should be made public. We are working on that.

With respect to the conflict-of-interest provisions of Title 18 U.S. Code, my own recommendation would be to narrow their application somewhat by permitting the agencies greater leeway, in chartering the committee, to decide on the basis of the function of the committee whether its members should be considered special Government employees or not. Thus, for those committees, particularly the scientific advisory committees, such as the Nuclear Regulatory Commission's Advisory Committee on Reactor Safeguards, where, very clearly, the agency must be able to rely on total objectivity just as much as for its own full-time employees, I would not change their status as SGE's.

With respect to members of the policy committees, where the members are expected to bring in what one might call some intellectual or interest baggage, my recommendation would be to cease classifying them as SGE's, and to rely primarily on financial disclosure and balance to get the desired degree of overall committee objectivity.

The President's Commission, I think, sees the problem very much as I do. Their recommendation is somewhat different in that they would provide an improved waiver system for dealing with the situation that I would deal with by simply ceasing to classify these members as special Government employees.

Finally, I think we can all agree, at a minimum, that if no changes are made in the coverage of the conflict-of-interest laws, the agencies must do a better job of advising committee members and proposed members of their potential exposure. It is true, and this point must be emphasized, actual prosecutions under section 208 are very few, and I am aware of no case involving an advisory committee member. But the potential is there. It could lead to embarrassment, if nothing worse. And the Government owes it to these members, many of whom volunteer their services without compensation, to warn them fully of the risks and how they may be avoided.

I note that S. 444 addresses this problem, particularly on Page 19, by making ethics counseling a part of the basic "drill," so to speak, when any advisory committee is established. This is good. I think I might go further and immunize advisory committee members from liability for any conflict arising out of an interest where that interest was appropriately disclosed and the agency impliedly acquiesced in the member's continued participation.

This concludes my prepared testimony. I would be glad to answer any questions.

Chairman GLENN. Thank you, Mr. Berg. We appreciate it.

Mr. Jasny?

TESTIMONY OF HENRY M. JASNY, CENTER FOR AUTO SAFETY, WASHINGTON, DC [1]

Mr. JASNY. Thank you, Mr. Chairman.

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[1] See p. 152 for Mr. Jasny's prepared statement.

My name is Henry J. Jasny, and I am an attorney speaking on behalf of the Center for Auto Safety, a public interest group that is dedicated to safety of motor vehicles and on the highways. On behalf of the Center, we wish to thank you, Mr. Chairman, and the Committee for the invitation and the opportunity to testify here on S. 444. This bill has many beneficial features that we can support and that improve the law, and full detailed comments with respect to many of those features are submitted to the Committee.

For my oral presentation, I would like to focus on our paramount concern with the bill, which appears in Section 4. It is an exemption for State and local officers and employees. We view this provision as a Trojan horse that is filled with special interest groups. There are two basic problems that will arise. One is that State and local interest groups have as their members many State and local officers and employees of State departments. These people do not operate in a vacuum. They are members of these interest groups, and they often participate in the interest group resolution of decisions that are then supplied to Federal officials through these officers and employees. They do and will present to Federal officials the views of the private interest groups which they adopt.

The second area that creates a problem is that the States and localities are often interested parties themselves under Federal programs, either as grantees of Federal tax funds or as the regulated parties under Federal programs. They have a viewpoint, and they have vested interests. Invariably, States and State officers and officials will seek more Federal funds and less Federal regulation.

I will relate to you our experience as an organization with the Federal Highway Administration as an example. The Federal Highway Administration administers the Federal Aid Highway Act, which this year will distribute $12.7 billion in Federal tax funds from the Highway Trust Fund. Federal officials there are charged with the safety of millions of motorists on a million miles of highway, over half a million bridges, and their decisions directly affect the safety of all of these things.

The Federal Highway Administration often utilizes a special interest group as a preferred source of advice and recommendations. It is a private interest group made up of State and local officers and employees, as well as State membership.

In our example, the State members are members of State Departments of Transportation. They meet as an interest group, and they vote and decide upon issues as an interest group. They are an independent private interest group. They do not represent any particular set of States or any individual State. The name of the group is the American Association of State Highway and Transportation Officials, known as AASHTO.

We have litigated in the past under Federal law the issue as to whether or not this is a separate and private interest group, and the Circuit Court of Appeals has agreed with us that it is.

As an example of how the current law without the exemption works, and works well, I will point to a bridge inspection rule. After the 1966 Safety Act was passed by Congress, the Federal Highway Administration determined that it should be a 2-year rule for safety inspection of bridges. That is, every major bridge should be inspected every 2 years.

Subsequent to that, AASHTO as a private interest group felt that that was too great a burden to its members and too high a cost to pay for safety inspections. AASHTO wanted a 4-year rule for all bridges.

The Federal Highway Administration proposed in rulemaking, but later withdrew, a 4-year rule after public comment went against it. In their determination to withdraw that proposal, they cited the fact that it would be unsafe to do so. In opposition were the Center for Auto Safety as well as a minority of States, including your own State, Mr. Chairman, Ohio.

Nevertheless, several years later, despite Federal Highway Administration's determination that it would be unsafe to go ahead with the 4-year rule, AASHTO again requested, through the rulemaking process, that the Federal Highway Administration go to a 4-year rule. What resulted from that was a limited 4-year rule affecting maybe 20 percent of the bridges on the Federal-aid highway network.

While FHWA did pass a milder version of this rule, had they been able under an exemption to speak with committees of State and local officials, in private behind closed doors, with respect to this view, it would have come out into rulemaking as a jointly authored version of the Federal Highway Administration and the State and local officials. In that posture, I daresay it would be impossible for the public interest community, for the Center, or for the State of Ohio to have stopped that rule from going through.

It is only in that regard that the Federal Advisory Committee Act, without the exemption, prevented an unsafe rule from being passed into Federal regulation.

There are several pragmatic problems that I foresee with this rule as well. One is that since these meetings would be exempt from FACA and the public would have no knowledge of when they are taking place or what is being discussed, there would be virtually no way to detect violations.

The second is an interpretation of the phrase "acting in their official capacity." I believe that that will engender litigation. Once a group through some means finds out about such a meeting, the question is where do they cross the line between acting in their official capacities or acting on behalf of their interest group that they may be a member of. And there are a multitude of interest groups out there.

Third, as it states in the bill, this would apply only to those State and local interest groups where Federal officials are directed to meet with the States. I can envision where there are two systems, a duality, where some Federal officials are required to meet with the States and can conduct their meetings behind closed doors without notice. Other Federal officials meeting with the same kinds of groups, the same kinds of State people, would have to comply with the FACA. I believe that that would end up being observed more in the breach than in the fulfillment of the law.

In conclusion, I would just state that the Federal Advisory Committee Act fundamentally was passed as an open and fair government bill. It holds Federal decision-makers at arm's length regarding advice and recommendations from interested parties in order to ensure that fair and open government decision-making occurs. This exemption will create an uneven playing field where one group or party will have a distinct advantage.

Thank you. I am available for any questions that the committee has.

Chairman GLENN. Thank you, Mr. Jasny.

Back to Mr. Murphy first. Mr. Murphy, after comparing your testimony here today with your organization's testimony last October on similar legislation I introduced in the 100th Congress, there seem to be several places where you previously advocated a position which we incorporate in S. 444, but now you object to it. Our definition of subcommittee is one example.

Can you explain the change of heart from your organization?

Mr. MURPHY. Mr. Chairman, I do not believe it is a change of heart. I think it is a reflection of a continuum. We certainly very much appreciated your good ear in October.

I think the concern we feel now is that the breadth of the definition, even though it might reflect what we said in October, as we see it now on paper—and we have not had more than 2 weeks to reflect on this as a group, the concern we have now is that the definition is very broad—indeed; that it will impose a chilling effect, frankly, that is undesirable. Specifically, we are talking about the application of the chartering requirement to subcommittees. No member of our group, of whom I am aware, feels that that will be a useful step. We are concerned that the breadth of the current definition of subcommittee—despite what we may have expressed in October. We would like to see a small narrowing.

Chairman GLENN. Okay. On another subject, earlier today Mr. Plager testified he intends OMB's review of new committees will be conducted concurrently with GSA's 15-day review. That shortens things up. Does this satisfy your organization's concerned about avoiding delays in the agency's ability to establish advisory committees?

Mr. MURPHY. Mr. Chairman, I think it would go a long way toward it. But we are concerned, as a matter of good management practice, about having a duality of management centers—agency, GSA and OMB. We certainly do not disagree with you that someone should be overseeing the process. We are concerned about the potential for delay though.

Chairman GLENN. You just heard Mr. Jasny's testimony here. The Center for Auto Safety strongly believes that the new proposed exemption for statutorily mandated meetings between State, local and Federal officials will open the door to undue influence by special interest groups, such as AASHTO that he just mentioned. How do you respond to that prediction?

Mr. MURPHY. Well, I think there are a couple of ways, Mr. Chairman. I think Mr. Jasny's group—and I have had the pleasure of working with him and his colleagues for years on this—know how to take care of themselves. They have been successful in their litigation. They will be successful, I am sure, in the future if problems arise. There have not been a lot of cases in this area where there have been problems. Mr. Jasny has, I believe, taken care of them.

I think your staff, sir, has addressed this issue in the largest measure with the term "acting in their official capacities." That does have a meaning, and it may be subject to litigation. But the purpose of it, I believe, is to be sure that these State and local persons are representing their governmental entities and not operating as special interests.

Chairman GLENN. Okay. Mr. Jasny, do I understand your testimony to suggest there should be no meetings of Federal, State and local officials that are not covered by FACA?

Mr. JASNY. Of committees, that is correct.

What I would like to point out is that there are many meetings between Federal and State officials.

Chairman GLENN. Well, yes, that is the point. That there should be no meetings between them?

Mr. JASNY. No, not that there should be no meetings. There are many meetings, and there is much input from State and local officials. Certainly from the governor on down, unsolicited advice and recommendations, and meetings, occur regularly.

Chairman GLENN. Where do you draw the line? What is okay and what is not?

Mr. JASNY. What we are concerned about is the utilization of a group of State officers and officials on a regular basis. And that has happened in the past, although this bill would allow it to happen as an everyday event. We perceive that there is a problem. Federal officials have the opportunity to—and they do—consult with State officials one on one. They meet with them. When the governor of your State comes to Washington——

Chairman GLENN. How about two on two? How about three on three?

Mr. JASNY. Well, that is where we start to draw the line, where they start to set up an ad hoc group that will meet.

Chairman GLENN. And where do you draw it? That is our problem. How do you draw it up in law so that a governor is not scared to death he is going to be in Federal prison if he comes to Washington for a meeting?

Mr. JASNY. Well, I do not think the governor ever has to worry about that. To my knowledge, no one has ever objected to a governor meeting with a Federal official because elected officials——

Chairman GLENN. How about Director of Highways?

Mr. JASNY. Director of Highways is a different problem.

Chairman GLENN. One, two, three? What is a meeting and what is not? That is our problem here. I am serious about it.

Mr. JASNY. I realize that.

Chairman GLENN. I know we are joking about it, but it is a serious problem for us. Because we are putting it in law and with big penalties if they violate the law.

Mr. JASNY. I understand that, Mr. Chairman. I would have to say that I cannot give you a number as to two or three or four. I would have to say it is more of a process where a Federal official is regularly meeting with more than one or more than two—if you want to pick a number, I think the committee should do that—but where they are meeting as a regular group to obtain advice as a preferred means of getting the information, then that is where we would have to draw the line, more as a procedure than just flat numbers.

Chairman GLENN. In the example you gave where AASHTO met and the decisions that apparently were reversed or where their interest group, as you called them, was preeminent in the decision somehow, were there meetings that gave the other side of that issue from other people, as far as you know? Or was AASHTO the only one invited in?

Mr. JASNY. In the example I gave, there were no meetings, not even with AASHTO. AASHTO presented its view separately and asked for a proposal to be made. That any citizen has the right to do. And that is the way the system should work, and that is the way it worked in that case.

There are other examples which I have supplied to your staff in the past of where AASHTO acted in violation of the FACA, and we could go on about that and discuss that, if you wish.

Chairman GLENN. Your testimony on the bill's balanced provisions argues for a "legislated standard" for achieving balanced membership. Could you flesh that out a little bit? What do you mean by this, and how would you legislate the components of balanced membership which would cover all the types of committees which exist: policy committees, peer review committees, scientific committees, technical panels?

Mr. JASNY. The problem we are alluding to, Mr. Chairman, is that although fairly balanced is an ideal set forth in the statute, for 13 years or so Federal courts have said there is no law to apply. This does not tell us what Congress meant, and, therefore, it is unenforceable. And they do not enforce that language. That is why we have called for some kind of criteria to be set forth in this statute.

Now, I realize that it is a very difficult problem to do that in sufficient enough detail so that a Federal judge has something to apply without going into so much detail that there is no flexibility. We would support some kind of language that sets out a proportional representation of maybe major groups, such as private interests, corporations, academia, public interests, State and local officers and officials; and that within that would allow flexibility to the agency to decide that if they have to deviate from those groups for some reason, that they issue a written statement as to why.

Chairman GLENN. Mr. Berg, during your study of the ethics issues, did you learn what percentage of advisory committee members are paid for their service and, therefore, would be subject to financial disclosure requirements because they are Federal employees?

Mr. BERG. No, Senator, I did not. But let me point out that if the members are classified as special government employees, whether or not they are paid, they would be subject to financial disclosure.

With respect to numbers, I was disappointed in what I was able to find out from GSA's Committee Management Secretariat. They do not have very good breakdowns by classification. I relied primarily, in terms of the statistics, almost exclusively on the annual reports and on the agency responses to your committee questionnaire.

Chairman GLENN. Okay. One last question before I turn this over to Senator Levin. What do you think of the recommendation of the President's Ethics Commission concerning conflicts of interest on the part of advisory committee members? Did you go into that?

Mr. BERG. Yes. I agree with them generally as to the existence of the problem. I disagree somewhat with respect to their proposed solution.

They are proposing an amendment to Section 208 which would broaden the availability of waivers. I am not sure that under existing Department of Justice interpretations such an amendment is necessary. And in view of the other drawbacks that I found to the use of the waivers, I am not sure that effecting that amendment would cure the problem.

Chairman GLENN. It is very difficult. That is a very touchy area because what they are doing is giving a waiver; they recommend that criminal conflicts-of-interest laws should be amended to make it easier for advisory committee members who are Federal employees with substantial interest in the matters under consideration to receive waivers from conflict-of-interest laws.

Now, I can argue both sides of that: that they should not receive waivers but, on the other hand, they have a level of expertise that should be brought to bear on that. We cannot assume going in that everybody is a crook. People work with good intentions in here, too.

How to grant a waiver like that where there is conflict of interest without getting yourself into a quagmire?

Mr. BERG. Well, that obviously is part of the Department of Defense's problem. They will not give waivers because they do not like the looks of giving waivers. On the other hand, if you are empaneling an advisory committee, bringing in people from the constituencies that have an interest, these people are going to have a financial interest. And if you do not want their advice, then do not bring them in. But do not bring them in and then subject them to criminal penalties for essentially bringing with them the interests that you have selected them for.

Chairman GLENN. But the more specialized committees in the technical areas—more to the point, the more scientific and technically specialized the problem is that the committees are working on—the more difficult this becomes. I am thinking of the whole nuclear cleanup thing that we have had hearing after hearing after hearing on in this very room, and how we are going to do that, and how do you bring people in. And we have people with nuclear expertise that are working for a contractor or somebody. We call them back in. They may have been in Government before. They may be in Government now. How do you deny a conflict of interest there, at the same time you need their technical expertise and they give it? And they are good, most of them. But that is tough.

Mr. BERG. That is right. That is a particular problem area. I discussed it with a lawyer over at NRC.

With respect to the ACRS Committee, there is a flat ban on certain stock holdings, on direct financial interest, but there is no way they can completely guard against the sort of interest that comes from working within for the fairly narrow industrial and academic nuclear energy community. So, occasionally, waivers based on that sort of affiliation are given.

In my proposal, I would not propose classifying members of scientific advisory committees as other than special Government employees. I would make no change there. If the broader policy-oriented committees, where the people are supposed to have an interest——

Chairman GLENN. Then they will pull back and say define "scientific" at that point. Now you are in trouble all over again.

Mr. BERG. I think the agency that is chartering the committee has got to know what it is they want from the committee.

Chairman GLENN. It is hard to do.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. I just have a few questions for Mr. Berg.

As I understand it, you would require both the special government employees and the people who represent the non-Federal interests to file disclosure forms?

Mr. BERG. Yes, I would.

Senator LEVIN. You would eliminate the existing distinction which we make in that area?

Mr. BERG. In terms of disclosure, yes, I would.

Senator LEVIN. You would create a new distinction relative to the kinds of committees that we have, one being called a general committee and one being a technical committee, as to the applicability of conflict-of-interest laws, as I understand your testimony. Is that correct, just in general?

Mr. BERG. It is not so much a new distinction as I would move the line of distinction a few degrees, and make the question for the agency to answer, not whether its members are being appointed as individuals or representatives—which I think is meaningless—but whether this is the kind of committee on which you want total objectivity or the kind of committee on which you are more or less expecting the sort of interests we have been talking about.

Senator LEVIN. That still is a new distinction, because you are talking about what kind of committee rather than who you are representing.

Mr. BERG. Yes, that is right. That is right.

Senator LEVIN. So you are eliminating one distinction and creating a new distinction.

Now, as far as the distinction that you are eliminating, why should we require people who we know are representing a special interest to disclose their financial holdings? We know it going in. Why put them through that wringer? If they are there to represent a particular interest, why are we then saying we now want you to disclose it, where the purpose of a disclosure is to ascertain whether someone has a hidden interest? It is not hidden. It is very open here. What is the purpose in eliminating that distinction?

Mr. BERG. Well, with respect to that, Senator Levin, the question of exactly how much they have to disclose is open. I would not require a general disclosure of all financial interests, but simply a disclosure essentially, A, of employment and major affiliations; B, of those financial interests in the areas that have some relevance to what the committee is going to be doing.

Senator LEVIN. Would you have a different type of disclosure for the Government employees from the non-Government employees?

Mr. BERG. Not necessarily. That is primarily what you do with special Government employees now.

Senator LEVIN. You would not change——

Mr. **Berg**. There is no requirement for special Government employees, that they give a complete rundown of financial holdings.

Senator **Levin**. You would change the disclosure?

Mr. **Berg**. I would keep basically the same disclosure that is now required of SGE's.

Senator **Levin**. Again, what is the reason for requiring somebody to disclose any financial interest where they are there to represent a special interest? Why require that rigmarole at all? That is my question.

Mr. **Berg**. Well, for one thing, the interest that he has may be somewhat different from what they think it is when they appoint him. The interest may be more or less intense.

I would not require necessarily information which is simply cumulative; that is, if he is the president of a lumber company and he is appointed on a committee dealing with wood products, the fact that he has also got shares in the company does not interest me particularly.

Senator **Levin**. The other question I have has to do with the new distinction that you would create. Before I address that, you say there is no way of our knowing how many additional people would have to file disclosure forms under your proposal. Would it be your best guess that as many as half of the people who now serve on committees are representatives of special interests so that they now do not have to file disclosure forms? Could it be that many?

Mr. **Berg**. It would be a wild guess. It could be that high. I honestly do not know.

Senator **Levin**. All right. Do you know about how many people are on Federal advisory committees now? Do we have a number?

Mr. **Berg**. I have a figure in my report. I think the figure from the 16th Annual Report, the last but not the current one, is something like 19,000 to 20,000.

Senator **Levin**. So it could be as many as 10,000 additional people, roughly, if the 50 percent guesstimate is accurate, that would have to file these disclosure forms?

Mr. **Berg**. Possibly. Possibly.

Senator **Levin**. Now, the other question that I have is about the new distinction that would be created between types of committees. How would you label committees as being general advisory committees or narrow scientific advisory committees?

Let me give you a couple of examples: An advisory committee on student financial assistance. You want objectivity in lots of aspects of that. You also, I think, want some general recommendations. How do you label them one or the other?

Mr. **Berg**. Well, it is hard to do it just from the name of the committee, but it sounds to me like that is fairly general.

Senator **Levin**. Say it is both.

Mr. **Berg**. Well, I would put the burden on the agency. The agency is creating the committee.

Senator **Levin**. Say it is both.

Mr. **Berg**. Well, if part of its mandate is sufficiently specific that you want great objectivity, then classify them as special Government employees and perhaps give them waivers, partial waivers, depending on what they are doing.

I think part of the problem is that the agencies are going to have to tell their members what they are looking to them for. Right now, the burden is very heavy on the member, who does not know, necessarily, what the committee is there for to anticipate conflicts and to deal with these problems.

Senator **LEVIN**. Thank you so much, Mr. Berg. I appreciate all of you being here.

Thank you, Mr. Chairman.

Chairman **GLENN**. Fine. Thank you. The hearing will stand in recess subject to the call of the Chair. Thank you for being here.

[Whereupon, at 11:41 a.m., the Committee adjourned subject to the call of the Chair.]

APPENDIX

101st CONGRESS
1st Session

S. 444

To amend the Federal Advisory Committee Act.

IN THE SENATE OF THE UNITED STATES

February 23 (legislative day, January 3), 1989

Mr. Glenn (for himself, Mr. Levin, Mr. Roth, Mr. Pryor, Mr. Kohl, Mr. Heinz, Mr. Lieberman, Mr. Stevens, and Mr. Sasser) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To amend the Federal Advisory Committee Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Advisory Committee Act Amendments of 1989".

REFERENCES

Sec. 2. All references in this Act are to the Federal Advisory Committee Act (5 U.S.C. App.), unless otherwise provided.

FINDINGS AND PURPOSES

Sec. 3. Section 2(b) of the Act is amended—

(1) in paragraph (1) by amending such paragraph to read as follows:

"(1) the need for each existing advisory committee should be periodically reviewed;";

(2) in paragraph (2) by inserting after "essential" the following: "and only when the information to be obtained is not already available through another advisory committee or source within the Federal Government,";

(3) in paragraph (4) by inserting "utilization," after "establishment,";

(4) by redesignating paragraphs (5) and (6) as paragraphs (7) and (8), respectively, and inserting after paragraph (4) the following new paragraphs:

"(5) the composition of any such committee should be fairly balanced in membership in terms of the points of view represented and the functions to be performed by the advisory committee, with emphasis given to considering for membership those interests which will be directly affected by the work of the committee and to obtaining expertise relevant to the work of the committee;

"(6) the purpose for and objectives of the committee should be clearly delineated in the charter of such committee";

(5) in paragraph (7) (as redesignated by paragraph (4) of this section) by striking out "and" after the semicolon;

(6) in paragraph (8) (as redesignated by paragraph (4) of this section) by amending such paragraph to read as follows:

"(8) the function of advisory committees should be advisory, and that determinations of action to be taken and policy to be expressed with respect to advisory committee reports or recommendations shall be made solely by the President or an officer or employee of the Federal Government; and"; and

(7) by adding at the end thereof the following new paragraph:

"(9) to the greatest extent practicable, an advisory committee should conduct all business furthering the purpose and objectives of the committee through meetings.".

DEFINITIONS

SEC. 4. Section 3 of the Act is amended—

(1) in paragraph (2)—

(A) in subparagraph (A) by striking out "or reorganization plan, or" and inserting in lieu thereof "or authorized by statute;";

(B) in subparagraph (B) by striking out the comma and inserting in lieu thereof a semicolon; and

(C) by striking out the matter following subparagraph (C) and inserting in lieu thereof:

"in the interest of obtaining advice or recommendations for the President or one or more agencies, officers or employees of the Federal Government, except that such term excludes—

"(i) the Advisory Commission on Intergovernmental Relations;

"(ii) any committee established or utilized by the Central Intelligence Agency;

"(iii) any committee established or utilized by the Federal Reserve System;

"(iv) any committee composed wholly of full-time officers or employees of State or local governments acting in their official capacities who are required by statute to meet with Federal officers and employees regarding programs that are shared by Federal, State, and local Governments, or which are administered by State and local Governments;

"(v) any committee which is composed wholly of full-time officers or employees of the Federal Government;

"(vi) any local civic group whose primary function is that of rendering a public service with respect to a Federal program; and

"(vii) any State or local committee established to advise or make recommendations to State or local officials or agencies."; and

(2) by redesignating paragraphs (3) and (4) as paragraphs (5) and (6), respectively, and inserting after paragraph (2) the following new paragraphs:

"(3) The term 'subcommittee or other subgroup' as used in paragraph (2) means any group established by a committee (regardless of whether its members are drawn in whole or in part from the parent committee) which is authorized to act on behalf of the committee and which reports either to the committee or directly to the President or one or more agencies, officers or employees of the Federal Government.

"(4) The term 'meeting' includes any interaction between either a majority of the members of an advisory committee, or a subcommittee or other subgroup thereof, or any smaller number of members which is authorized to act on behalf of the committee, or subcommittee or other subgroup thereof.".

PROHIBITIONS AND APPLICABILITY

SEC. 5. Section 4 of the Act is amended to read as follows:

"PROHIBITIONS AND APPLICABILITY

"SEC. 4. (a) No advisory committee shall be established or utilized by the President or by one or more agencies of the Federal Government, unless the establishment or utilization is—

"(1) specifically authorized by statute or by the President; or

"(2) specifically determined as a matter of formal record, by the head of the agency involved, after consultation with the Administrator, to be in the public interest in connection with the performance of duties imposed on that agency by law.

"(b) No advisory committee shall meet or take any action with respect to its purpose and objectives for the Federal Government unless a committee charter has been filed in accordance with section 7.

"(c) The function of advisory committees shall be advisory only, unless otherwise specifically provided by a statute or Presidential directive. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer or employee of the Federal Government.".

ESTABLISHMENT OR AUTHORIZATION OF ADVISORY COMMITTEES BY CONGRESS

SEC. 6. Section 5 of the Act is amended—

(1) by amending the section heading to read as follows:

"ESTABLISHMENT OR AUTHORIZATION OF ADVISORY COMMITTEES BY CONGRESS";

(2) by amending subsection (a) to read as follows:

"(a) The Congress may by statute establish or authorize the establishment of an advisory committee.";

(3) in subsection (b)—

(A) in the first sentence by—

(i) striking out "In" and inserting in lieu thereof "When";

(ii) striking out "each standing committee" and inserting in lieu thereof "a Committee";

(iii) striking out "determine" and inserting in lieu thereof "consider"; and

(iv) striking out "such determination";

(B) in paragraph (1) by amending such paragraph to read as follows:

"(1) contain the clearly defined and detailed purpose for and objectives of the advisory committee;";

(C) in paragraph (2) by striking out "functions to be performed by the advisory committee;" and inserting in lieu thereof "committee functions to be performed by the advisory committee, and shall prescribe the factors to be considered in achieving balanced membership;";

(D) in paragraph (3) by—

(i) striking out "contain appropriate provisions to assure that" and insert in lieu thereof "contain provisions to indicate the appointing authority for the members of the advisory committee and to"; and

(ii) striking out "will" each place it appears and inserting in lieu thereof "shall"; and

(E) by striking out paragraphs (4) and (5) and inserting in lieu thereof the following new paragraphs:

"(4) indicate whether members of the committee shall—

"(A) be appointed as Federal employees; or

"(B) represent the views of non-Federal interests;

"(5) contain provisions dealing with authorization of appropriations, the duration of the advisory committee if other than the two-year period provided for under section 16(a), and dates for the completion and publication of any reports; and

"(6) contain provisions to assure that the advisory committee shall have adequate staff, quarters, and funds to meet necessary expenses, and for Presidential advisory committees and committees reporting to more than one agency, to indicate the agency responsible for providing support services (as defined in section 14(c)).''; and

(4) by striking out subsection (c).

RESPONSIBILITIES AND ADVISORY COMMITTEE PROCEDURES

SEC. 7. The Act is amended by—

(1) striking out section 15;

(2) redesignating sections 12 through 14 as sections 14 through 16, respectively; and

(3) striking out sections 6 through 11 and inserting in lieu thereof the following new sections:

"ESTABLISHMENT OR UTILIZATION OF ADVISORY COMMITTEES BY PRESIDENT OR AGENCY

"SEC. 6. (a) The President or an agency head may establish or utilize an advisory committee pursuant to a statute, Presidential directive, or agency directive. Any agency directive shall be a matter of formal record, subsequent to consultation with the Administrator.

"(b) When considering establishing or utilizing any advisory committee the President or agency head shall consider whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee in existence, or by enlarging the mandate of an existing advisory committee. At the time any advisory committee is first established or utilized, the President or agency head shall make a determination in writing which shall—

"(1) contain the clearly defined and detailed purpose for and objectives of the advisory committee;

"(2) require the membership of the committee to be fairly balanced in terms of the points of view represented and the committee functions to be performed, and shall prescribe the factors to be considered in achieving balanced membership;

"(3) contain provisions to indicate the appointing authority for the members of the advisory committee and to assure that the advice and recommendations of the advisory committee shall not be inappropriately influenced by the appointing authority or by any special interest, but shall be the result of the independent judgment of the advisory committee;

"(4) indicate whether members of the committee shall—

"(A) be appointed as Federal employees; or

"(B) represent the views of non-Federal interests;

"(5) contain provisions dealing with authorization of appropriations, the duration of the committee if for a duration less than the two-year period provided for in section 16(a), and dates for the completion and publication of any reports; and

"(6) contain provisions to assure that the advisory committee shall have adequate staff, quarters, and funds to meet necessary expenses, and for Presidential advisory committees and committees reporting to more than one agency, to indicate the agency responsible for providing support services (as defined in section 14(c)).

"(c) The information required under subsection (b) shall be in—

"(1) the Presidential directive in the case of an advisory committee established or utilized by the President; or

"(2) a timely notice published in the Federal Register in the case of an advisory committee established or utilized by an agency.

"CHARTERING OF ADVISORY COMMITTEES

"SEC. 7. (a) The charter of an advisory committee shall contain at least the following information:

"(1) the name of the committee;

"(2) whether the committee is—

"(A) established or authorized by statute;

"(B) established or utilized by the President; or

"(C) established or utilized as a matter of formal record by the head of the agency involved;

"(3)(A) the date the charter is filed;

"(B) whether such charter is an original charter or a renewal; and

"(C) if a renewal charter, the date when the committee was first chartered;

"(4)(A) the agency responsible for providing support services to the committee; and

"(B) the agency or official to whom the committee reports;

"(5) the clearly defined and detailed purpose for and objectives of the committee;

"(6) the appointing authority for the advisory committee members and the plan for achieving a fair balance in committee membership in terms of the points of view represented and committee functions to be performed;

"(7) whether committee members are to serve as Federal employees or representatives of non-Federal interests and which agency or official shall be responsible for counseling advisory committee members on

Federal ethics rules and criminal conflict of interest statutes;

"(8) the estimated number and frequency of committee meetings and the estimated total period of time necessary for the committee to complete all tasks;

"(9) the location of the records and documents of the committee during its existence and for at least one year after the committee ceases to exist;

"(10) the estimated annual operating costs in dollars and person-years for such committee; and

"(11) the termination date of the committee, if other than the two-year period provided for in section 16(a).

"(b) For each advisory committee, a charter in accordance with this section shall be filed with—

"(1) the Administrator;

"(2) the head of the agency which established, utilizes, or provides support services for such advisory committee or in the case of an advisory committee not assigned to an agency for support services, the advisory committee itself; and

"(3) the standing committees, in the Senate and the House of Representatives, having jurisdiction over such advisory committee.

"RESPONSIBILITIES OF CONGRESSIONAL COMMITTEES

"SEC. 8. In the exercise of its legislative and oversight functions, each standing committee of the Senate and the House of Representatives may review the activities of each advisory committee under its jurisdiction to determine whether—

"(1) such advisory committee should be terminated or merged with any other advisory committee;

"(2) the responsibilities of such advisory committee should be revised; and

"(3) such advisory committee complies with this Act and any other rule, order, regulation, or policy governing advisory committees.

"ADDITIONAL RESPONSIBILITIES OF THE PRESIDENT

"SEC. 9. (a) The President may delegate responsibilities for evaluating and taking action, where appropriate, with respect to all formal recommendations made to him by Presidential advisory committees.

"(b) Within one year after the date on which a Presidential advisory committee submits formal recommendations to the President, the President or a delegate shall submit a report to the Congress describing either proposals for action or reasons for inaction, with respect to such recommendations.

"(c)(1) The President shall ensure that committee charters required by this Act for Presidential advisory committees are filed in accordance with section 7.

"(2) The President shall also ensure that prior to their participation in any meeting or work of a Presidential advisory committee—

"(A) all members receive counseling on the Federal ethics rules and conflict of interest statutes; and

"(B) those members who are Federal employees disclose in writing any financial or other interest which may be affected by the work of the committee, or create the appearance of a conflict of interest.

"(3) The President may delegate the responsibilities described under paragraph (1) and (2).

"(d)(1) No later than February 1 of each year, the President shall make an annual summary report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall be a summary and analysis of information contained in the annual report of each agency which established or utilized an advisory committee during that period. The summary report shall include—

"(A) the name of every advisory committee and the total estimated annual cost to the United States to fund, service, supply, and maintain such committees;

"(B) a summary and analysis of data regarding the establishment and termination of advisory committees during the preceding fiscal year;

"(C) whether such committees are ad hoc or standing committees;

"(D) the membership of such committees;

"(E) the frequency and openness of meetings;

"(F) the number of reports submitted;

"(G) a list of the advisory committees which terminated or were abolished by the President or an agency during the preceding year;

"(H) in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished before their specified termination dates, together with the reasons therefore and the statutory authority for their creation; and

"(I) any issues of concern in the functioning of advisory committees or this Act.

"(2) The President may exclude from the annual summary report any information which the President determines should be withheld for reasons of national security, and in lieu thereof shall include in such report a statement that such information has been excluded.

"ADDITIONAL RESPONSIBILITIES OF AGENCY HEADS

"SEC. 10. (a)(1) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees. Such guidelines and controls shall be consistent with this Act and any rule, order, regulation, or policy of the Administrator under sections 11 and 12.

"(2) Each agency head shall conduct annual reviews of committees or other groups established, utilized, or contracted for by the agency to determine whether any are advisory committees subject to this Act and, if so, to bring such committees or groups into compliance with the requirements of this Act.

"(b) Each agency shall maintain systematic information on—

"(1) the nature, functions, and operations of each advisory committee (including each subcommittee or other subgroup as defined in section 3(3)) within the jurisdiction of the agency; and

"(2) the agency's compliance with this Act and with its own rules for advisory committees.

"(c) The agency head shall—

"(1) designate an Advisory Committee Management Officer for the agency;

"(2) comply with section 6 in establishing or utilizing any advisory committee;

"(3) file a charter in accordance with section 7 of this Act for each advisory committee—

"(A) which is established or utilized by the agency; or

"(B) for which the agency has been delegated this responsibility by the President;

"(4) appoint a designated Federal official for each such advisory committee;

"(5) require members of each committee established or utilized by the agency or of any Presidential advisory committee designated by the President, before participation in any committee meeting or work—

"(A) if they are Federal employees, to disclose in writing any financial or other interest which may be affected by the work of the committee, or create the appearance of a conflict of interest; and

"(B) to address with the designated agency ethics official the Federal ethics rules and conflict of interest statutes, and any possible ethical problem which may arise from serving on the advisory committee;

"(6) publish timely notice of committee meetings in the Federal Register, oversee timely completion of detailed committee minutes and otherwise oversee committee compliance with the procedures in section 12; and

"(7) abolish advisory committees before their specified termination dates when appropriate.

"(d)(1) No later than December 1 of each year, the head of each agency which establishes, utilizes, or provides support services to an advisory committee shall submit an annual report to and the Administrator on the activities, status, and changes in the composition of such advisory committees during the preceding fiscal year. The Administrator shall make such reports available to Congress upon request.

"(2) The agency head shall follow guidelines set forth by the Administrator for such annual report by the agency head.

"(3) The report shall include—

"(A) the name of each advisory committee which the agency has established, utilized, or provided support services during the preceding year;

"(B) the date of establishment, authority for creation, and expected termination of each committee;

"(C) whether such committee is an ad hoc or standing committee;

"(D) a list of each subcommittee or other subgroup (as defined in section 3(3)) in existence for each advisory committee;

"(E) the functions of each such committee;

"(F) the number and dates of meetings of each such committee during the preceding year;

"(G) the names and occupations of the current members of each such committee;

"(H) the total estimated annual cost to the United States to fund, service, supply, and maintain each such committee;

"(I) a list of the advisory committees which terminated or were abolished by the agency head during the preceding year;

"(J) in the case of advisory committees established by statute, a list of those advisory committees which the agency head recommends be abolished before their specified termination dates, together with the reasons therefore and the statutory authority for their creation; and

"(K) any issues of concern in the functioning of advisory committees or this Act.

"(4) The agency head may exclude from such annual report any information which such agency head determines should be withheld for reasons of national security, and in lieu thereof shall include in such report a statement that such information has been excluded.

"(e) Each advisory committee management officer shall—

"(1) exercise control and supervision over the establishment, operation, and procedures of advisory committees established or utilized by that agency;

"(2) assemble and maintain the reports, records, and other papers of any such committee during existence of the committee;

"(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers;

"(4) coordinate with the designated agency ethics official to ensure appropriate counseling on ethics issues and timely completion of any written disclosure obligations;

"(5) maintain in a single location a complete set of the charters and membership lists of each of the advisory committees (including each subcommittee or other subgroup as defined in section 3(3)) of such agency;

"(6) maintain information on the nature, functions, and operations of the advisory committees (including each subcommittee or other subgroup as defined in section 3(3)) of such agency; and

"(7) provide upon request copies of minutes of meetings and reports of the advisory committees (including each subcommittee or other subgroup as defined in section 3(3)) of such agencies.

"RESPONSIBILITIES OF THE ADMINISTRATOR OF GENERAL SERVICES

"SEC. 11. (a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

"(b) The Administrator may from time to time request such information as the Administrator determines necessary to carry out the functions under this section. Each agency head and advisory committee members shall cooperate by providing such information to the Administrator.

"(c) The Administrator shall—

"(1) prescribe administrative guidelines and management controls applicable to advisory committees;

"(2) to the maximum extent feasible, provide advice, assistance, and guidance to the President, agency heads, advisory committees, and committee members to ensure compliance with this Act;

"(3) establish guidelines for the annual report required of each agency under section 10(d);

"(4) review committees or other groups established, utilized, or contracted for by an agency to determine whether any are advisory committees subject to this Act and, if so, to bring such committees or groups into compliance with the requirements of this Act; and

"(5) when designated by the President, appoint a designated Federal official for Presidential advisory committees.

"(d)(1) The Administrator shall periodically conduct a comprehensive review of each existing advisory committee to determine whether—

"(A) such committee is carrying out its purpose;

"(B) consistent with the provisions of applicable statutes, the responsibilities assigned to the committee should be revised;

"(C) such committee should be merged with other advisory committees; or

"(D) such committee should be abolished before its specified termination date.

"(2) Upon the completion of a review, the Administrator may make recommendations to the President, an agency head, or the Congress with respect to any action that should be taken.

"(e)(1) The Administrator shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

"(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of title 5, United States Code;

"(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

"(C) services may be provided pursuant to section 3102 of title 5, United States Code, for members while in performance of advisory committee duties who—

"(i) are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)); and

"(ii) do not otherwise qualify for assistance under section 3102 of title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such title).

"(2) Nothing in this subsection shall prevent—

"(A) an individual who (without regard to service with an advisory committee) is a full-time employee of the United States; or

"(B) an individual who immediately before service with an advisory committee was such an employee,

from receiving compensation at the rate at which such individual otherwise would be compensated (or was compensated) as a full-time employee of the United States.

"(f) If there is disagreement on a material matter between the Administrator and an agency head regarding the establishment, management, or termination of advisory committees, the agency head shall have final authority, but a notice and description of the areas of such disagreement may be placed in the annual summary report required under section 9(d).

"ADVISORY COMMITTEE PROCEDURES

"SEC. 12. (a)(1) Each advisory committee meeting shall be open to the public and held—

"(A) at a reasonable time and in a place reasonably accessible to the public; and

"(B) in a meeting room sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public.

"(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator may prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

"(3) Interested persons shall be permitted to attend meetings of, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

"(b) An advisory committee may not report advice or recommendations to the President or one or more agencies or officers or employees of the Federal Government without first holding a meeting at which a majority of the committee members approve the advice or recommendations to be reported.

"(c)(1) Subject to section 552 of title 5, United States Code, records, which were made available to or prepared for or by each advisory committee, including reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents, shall be considered created by the committee. Such records shall be available for public inspection and copying—

"(A) at the time the records are distributed to the advisory committee members;

"(B) at a single location in the offices of the advisory committee or the agency which established, utilizes, or provides support services to the advisory committee during the existence of the advisory committee; and

"(C) at a single location to be specified in the committee's charter for at least one year after the committee ceases to exist.

"(2) Notwithstanding the provisions of paragraph (1), five years after the date on which a record is first created by a committee, such record may be stored in accordance with the provisions of the National Archives and Records Administration Act of 1984, and regulations promulgated thereunder by the National Archives and Records Administration.

"(d) Detailed minutes of each meeting of each advisory committee (including each subcommittee or other subgroup as defined in section 3(3)) shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified by the chairman of the advisory committee, or if appropriate, the chairman of the subcommittee or other subgroup, within forty-five days after the meeting.

"(e) Subsections (a) (1) and (3) of this section shall not apply to any advisory committee meeting which the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552b of title 5, United States Code.

"(f)(1) Unless otherwise provided by statute, Presidential directive, or agency directive, the designated Federal official appointed under section 10(c)(4) or section 11(b)(5) shall attend the meetings of an advisory committee and no advisory committee shall conduct any meeting in the absence of such official. The designated Federal official is authorized to—

"(A) adjourn the meetings when such official determines that adjournment is in the public interest;

"(B) approve or call the meeting;

"(C) chair the meeting when so determined by the involved agency head; and

"(D) except for Presidential advisory committees, approve the agenda of the meeting.

"AVAILABILITY OF TRANSCRIPTS

"SEC. 13. (a) Agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts and minutes of agency proceedings or advisory committee meetings.

"(b) As used in this section 'agency proceeding' means any proceeding as defined in section 551(12) of title 5, United States Code.".

ADMINISTRATIVE PROVISIONS

SEC. 8. Section 14 of the Act (as redesignated by section 7(2) of this Act) is amended—

(1) in the third sentence of subsection (b) by inserting "on a reimbursable basis" before the period; and

(2) by adding at the end thereof the following new subsection:

"(c) For purposes of this section, the term 'support services' means the provision of office space, telephone and computer service, and other administrative or clerical services that the advisory committee may need.".

TERMINATION OF ADVISORY COMMITTEES

SEC. 9. Section 16 of the Act (as redesignated by section 7(2) of this Act) is amended—

(1) in subsection (a) by—

(A) striking out paragraph (1);

(B) by redesignating paragraph (2) as subsection (a) and redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively; and

(C) striking out "established after such effective date" in the first sentence of subsection (a) (as redesignated in subparagraph (B) of this paragraph); and

(2) by amending subsections (b) and (c) to read as follows:

"(b)(1) In the case of an advisory committee established by statute with a specified duration longer than the two-year period provided for in subsection (a), the President or an agency head may abolish such committee after the two-year period and before its specified termination date if—

(A) the President or agency head gives one-hundred eighty days written notice of the intention to abolish such committee to the standing committee in each House of the Congress with jurisdiction over such advisory committee; and

(B) the President or an agency head first makes a finding that—

"(i) the tasks assigned to such committee are complete or obsolete;

"(ii) the primary functions of such committee have been assumed by another entity; or

"(iii) the termination of such committee is otherwise in the public interest.

"(2) If the Congress determines that the committee is necessary, the Congress may reestablish it within the one-hundred eighty-day period.

"(c)(1) To renew an advisory committee established or utilized by the President or an agency, the President or an agency head shall file, before the date of the scheduled termination of the committee, a committee charter in accordance with section 7.

"(2) An advisory committee may be renewed for a period not to exceed 2 years from the date a new charter is filed.

"(3) Subsequent renewals may be achieved in the same manner before the date on which such advisory committee would otherwise terminate.

"(4) A committee charter shall be filed in accordance with section 7 on behalf of each advisory committee established by statute prior to the expiration of each successive two-year period following the date of the enactment of the Act establishing such advisory committee.".

STATEMENT OF
S. JAY PLAGER
ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET

before the
SENATE GOVERNMENTAL AFFAIRS COMMITTEE

Hearings on the Federal Advisory Committee Act
March 15, 1989

Mr. Chairman, thank you for the opportunity to testify today on Federal advisory committees. Since I appeared before this Committee last October, a considerable amount of progress has been made improving the management and operation of Federal advisory committees.

At that time the Committee expressed concern about a number of areas. You had before you a report from the General Accounting Office (GAO) about deficiencies in the committee management practices of the agencies and of the General Services Administration (GSA). You were considering ways to strengthen the provisions of the Federal Advisory Committee Act that are designed to ensure that committee recommendations are arrived at in an open manner free from inappropriate influences. You were concerned about ethics and conflict of interest. Finally, you were concerned that some agencies had been deficient in ensuring that advisory mechanisms subject to the Act were in fact operated in a manner consistent with its provisions.

In my testimony last October I reviewed the work of the President's Council on Management Improvement (PCMI) relating to advisory committees. I discussed the work GSA had done to ensure the appropriate compensation of committee members and to foster discussions and awareness among the agencies. I noted that we continued to view GSA as the appropriate place to implement the oversight of committee management. In my discussion of the bill you introduced in the last Congress, S. 2721, I applauded the positive steps it took to provide for the elimination of statutorily-created committees that had completed their work. I endorsed the bill's definition of the term "meeting." At the same time I expressed concerns about the way the bill treated the issues of balanced membership and conflict of interest disclosure, and the way it might have created undue burdens on the abilities of agency heads and of the President to seek advice openly through advisory committees.

Since that time, we have been working with GSA, the agencies, the GAO, and this Committee to improve the oversight of advisory committee operations. GSA has published a Notice of Proposed Rulemaking that would clarify provisions in its rules covering ethics, reporting, and membership. OMB has issued Bulletin No. 89-08, "Improved Management of Federal Advisory Committee Operations." And you, with several distinguished colleagues, have introduced a new bill, S. 444, which clearly reflects your efforts to incorporate many of the suggestions you have received on S. 2721. Agencies find advisory committees an important source of advice and expertise, and I think we all share the goal of improving the quality and management of these committees without imposing unnecessary burdens on their operation.

I want to start out by bringing you up to date on our activities and views in the committee management area and then comment generally on the new bill.

Committee Management Activities

We greatly appreciate the support that this Committee and its staff have provided us in the committee management area, and in particular, in identifying committees which have completed their work and may thus be terminated. The letter from the Committee leadership to OMB Director Darman confirming our joint efforts to develop a bill to eliminate such committees should encourage agencies to identify them. In addition, we appreciate the work of the Committee in tasking GAO to identify committees that have not met and generally to push for better committee management. We look forward to continuing this joint project in a cooperative manner.

One of the major actions we have taken in the committee management area is the issuance of OMB Bulletin No. 89-08. In the short run we wanted to accomplish a committee-by-committee review. For the longer run, we are jointly developing a GSA-OMB plan for reviewing new and renewed advisory committees. Pursuant to your request, we will be glad to send you each agency's response to the OMB Bulletin as soon as they are in; since today is the due date, that should be soon.

Your invitation letter asked three specific questions concerning committee management. First, the letter asked for our views on GSA's response to the GAO's criticisms last October. We believe that GSA has begun to take appropriate corrective actions. GSA has made substantial progress in addressing GAO's recommendations, particularly towards improving the completeness and accuracy of the documentation that the Act requires of agencies and of GSA. We are working with GSA to assist it in responding to the GAO recommendations. GSA has been a partner in implementing our Bulletin. And by convening the Interagency Committee of Federal Advisory Committee Management, it has provided a forum for discussing the Bulletin's implementation with the agencies. I believe that GSA will testify in more detail about these accomplishments, and therefore I will not comment further now.

Second, you asked for our views on "the exact nature of the permanent relationship OMB seeks with GSA" in reviewing the establishment of new advisory committees by agency heads and in using the annual comprehensive review. The GSA-OMB relationship in these areas is evolving. We believe that the primary responsibility for committee management belongs in GSA's Committee Management Secretariat. Bulletin No. 89-08 reflects OMB's concern for and interest in committee management, and illustrates the kind of action we can take from time to time when there is a need. As far as the review of new committees, we intend to conduct OMB's review concurrently with GSA's 15-day review, in order to avoid needless delays. We are still working out the specifics of how we will incorporate the results of GSA's annual comprehensive review in the OMB budget and management review process. GSA and OMB are developing a joint plan that will reflect GSA's primary responsibility, while allowing OMB to continue to discharge its policy oversight responsibility. We will continue to keep this Committee informed as we work out the procedures with GSA.

Third, you asked how, when we reduce costs by eliminating an unnecessary advisory committee or reducing its expenses, we will avoid its replacement by "higher-priced individual consultants." First, we expect that the agency, after it agrees to terminate the committee, will reduce by the amounts saved its budget base for succeeding years. Second, there is a functional difference between the kind of broad advice that advisory committees are best suited to provide and the advice which can be obtained from individual consultants. We believe therefore that consultants would not address the same needs as an advisory committee. Third, through the increased educational efforts which GSA is undertaking to publicize the Act's requirements, we believe that agencies will be far less prone to substitute consultant arrangements for terminated advisory committees. Finally, for those advisory committees terminated by the "Termination Act" you are proposing, we think agencies will hear the message from Congress that advice in this area is no longer needed, and will be less likely to want to replace these committees with consultants.

The potential for problems with consultants suggests strongly that caution in making changes is advised in two respects. First, we must be careful that we do not eliminate committees that are continuing to perform useful and high priority functions. Second, we must ensure that, when we set up review and oversight mechanisms, whether administratively or by legislation, that we do not encumber the establishment and operation of advisory committees in a way that provides incentives for agencies to look for ways around the requirements of the Act.

I would like to turn now to the bill, S. 444.

S. 444

My comments are going to be necessarily general, as we do not yet have a fully developed Administration position on this bill that incorporates the advice of key agencies who use advisory committees. But let me assure you that we are interested in working with you to arrive at a bill that will take advantage of 16 years of experience under the Federal Advisory Committee Act and improve it where there is a demonstrated need for improvement. As I testified in October, while it may be useful to amend the Act, we would evaluate proposed revisions using four criteria: first, do the revisions to the Act promote the efficient use of advisory committees; second, do the revisions serve to clarify areas which have been the subject of frequent and expensive litigation; third, do the revisions avoid creating needless impediments to fruitful discussions between Federal officials and members of the public; and fourth, are statutory changes truly required, or would administrative action suffice?

Committee management is an important focus of S. 444. I understand that GSA will be providing more specific comments in this area in its testimony later this morning. Let me just observe that this committee management focus is appropriate because, in our view, improved committee management was one of the two primary purposes of the Act. As we did with S. 2721, we continue to support several of the initiatives that the bill authorizes, including the provision that will allow the President or an agency head to terminate a statutorily-created committee after giving the Congress adequate notice. As far as the bill's treatment of agency recordkeeping and reporting responsibilities, we are soliciting technical comments from the agencies in this regard, and have asked GSA to provide you with more detailed views as soon as practicable.

Ethics

An important area addressed in the bill is ethics. In brief, the bill would ensure that members who are Federal employees, including special Federal employees, confidentially disclose any financial interests which could be affected by the work of the advisory committee, or which might create the appearance of a conflict of interest. All members, including those who are not Federal employees, would receive counseling on Federal ethics rules and conflict of interest statutes from the agency ethics officer. We believe these approaches strike an appropriate balance between providing disclosure and creating a chilling effect on participation. Advisory committees are in one sense unique Federal entities: in a number of cases their members by definition have a "conflict of interest." Members are often selected precisely because they have real stakes in the committee's work, i.e., that of their employer or of the interest group that they represent. Financial disclosure would shed little additional light on those stakes. We agree with the bill's drafters that there is no use in extending financial disclosure requirements to committee members who are appointed for the express purpose of providing the government with a particular perspective.

An example of this practice, with which the Committee is familiar, is the Computer Security Act of 1987 (P.L. 100-235). The Act set up a statutory advisory committee to advise the Federal government on security and privacy issues pertaining to Federal computer systems. That statute required that one third of the committee's members come from the computer and telecommunications industry, so as to ensure direct input from parties interested in the development of computer security standards.

As you know, this Administration has put ethics issues at the top of its agenda. Indeed, the first advisory committee created by the President was the Ethics Commission. It will be important to integrate the ethics requirements for advisory committees with those applicable government-wide. Therefore, before making a final assessment of what needs to be done here, we should examine the recommendations of the President's Ethics Commission, which issued its report just last Friday. Further, I understand that the Office of Government Ethics is in the final stages of implementing a new confidential disclosure system in the Executive branch that would cover Federal advisory committee members.

The approach that the bill takes in the ethics area, while appropriate and constructive, may not require new law. It could be put in place administratively. We would be happy to discuss the possibility of treating this area administratively if you think that would be constructive.

I observed earlier that, in our view, the Federal Advisory Committee Act had two main purposes. One was to ensure the efficient use of advisory committees. The other was to reduce the risk that special interest groups would influence the implementation of policy in a manner that advanced their own concerns to the detriment of the public interest. This second purpose of the Act is served by the bill's ethics provisions. In addition, several other provisions in the bill are intended to serve this purpose. I want to comment briefly on two of these, the bill's definition of "meeting," and its treatment of balanced membership.

"Meeting"

OMB testified in 1984 that it would be useful for the Congress to define meeting, a view the courts have taken as well. The bill relates the term "meeting" to interaction among advisory committee members who are "authorized to act on behalf of the committee, or subcommittee or other subgroup." The phrase "authorized to act on behalf of" appears to demand first that the committee or subcommittee have formally directed or empowered these members to take actions, and second, that those actions may be taken "officially," either in the interest of the larger group, or as its representative, without further consultation being required.

The work of a committee is to provide advice, most often in the form of a report with recommendations, and to conduct debate and hear the views of interested parties in order to arrive at those recommendations. In the bill's formulation, then, when a group of members has been charged to get together to debate the issues or to hear views, a "meeting" would take place when they gathered to do so. Similarly, were they charged to gather and agree upon portions of a report which the larger body intended to accept without substantive change, such gatherings would also be meetings. On the other hand, informal discussions among members that did not produce near-final products would presumably not be covered.

There do seem to be some difficulties in the way the definition is presently drafted. We suggest that substituting "is" for "includes" in the phrase, "[t]he term 'meeting' includes any interaction . . ." would strengthen the definition. The present placement and use of the construction "between . . . members" also is somewhat confusing; perhaps what is meant is "among" members as described.

With these suggested changes, as we understand the proposed definition from S. 444 it is a positive step. Particularly if illustrated by appropriate limiting examples, it may satisfy our test of avoiding the creation of needless impediments to fruitful discussions.

Balanced membership

Finally I want to comment on some aspects of the policy and procedures the bill would create in the area of balanced membership. We think it prudent to be particularly cautious in this area for three reasons. The first is the wide range of committees that any definition must cover, and the difficulty of interpreting the words "fairly balanced" as they apply to narrowly technical committees.

The second reason is that we want to avoid language that will generate more litigation than the current approach. We do not share the view of some who believe that agencies will achieve fairly balanced membership only under the threat of litigation, or that the creation of additional opportunities for lawsuits will improve the process. The threat of litigation can create a chilling effect that can impede the formation of advisory committees. The key is to get the committees established so that the public is able to take advantage of the opportunity to participate in the committee's deliberations.

Our third reason for caution is linked to the second. As I stated earlier, we want to be sure that any changes we make support the economic and efficient use of advisory committees and that we do not establish unnecessary impediments to discussion. We want incentives for agencies to seek advice openly through the advisory committee process. We do not want to place additional requirements on the establishment of committees unless such action would clearly enhance their ability to involve appropriate segments of the public. Our caution applies not only to changes that would encourage litigation, but also to changes that would increase the administrative burden or reduce the flexibility of policy officials in connection with the membership selection process, without a compensating improvement in results.

I want to share with you our preliminary reaction to the changes in the bill in light of the above. We agree with the bill's intent to clarify the statutory treatment of balanced membership, but not with the mechanisms it proposes.

A useful change the bill makes in this area is to state more clearly the policy that applies to establishing fairly balanced membership. The bill ties the inclusion of those "directly affected" by the work of the committee to the functions to be performed by the committee. We find this linkage important. We need to provide for a range of situations such as the one described by Senators Glenn and Levin in their letter to GSA of December 1987, that is, that "the membership of a committee whose sole function is to consider scientific questions may be limited to qualified scientists."

The bill would also establish a two stage process of creating and publishing detailed technical specifications for achieving balance. We understand the intent of the two stage process -- the notice, followed by the charter -- to be, as Senator Levin stated at the time of the bill's introduction, to "focus attention on the issue of 'balance' early and often." The risk here is that we become overly prescriptive in a way that ends up unduly limiting the opportunity for public participation in agency decision-making. The bill establishes a series of increasingly technical tests to be applied to the selection process. At this point the bill seems to focus excessively on process. It is ultimately the membership that needs to be fairly balanced. Instead of getting on with the work of the committee, we will find ourselves arguing over whether or not the factors appear to be sufficient to produce balance and whether or not the plan is fully consistent with the factors. Past experience has shown that committees intended to address issues of great and immediate significance can become the subject of collateral attack about structure. Disputes over criteria of selection to achieve balanced membership lack sufficient focus until the committee members, and the interests they represent, are identified.

Mr. Chairman, we believe the aphorism that the proof of the pudding is in the eating applies with particular force here. If a committee's membership is not fairly balanced, then corrective action is appropriate. The procedures set up in GSA's proposed rule already provide ample opportunity to develop the record of the agency's intent to achieve balance by establishing a process wherein "a description of the agency's plan to obtain balanced membership" is included in the agency head's letter transmitting the proposed charter to the Administrator of GSA and is published in a notice.

The term "utilized"

Mr. Chairman, we have one additional comment. As you know, the Justice Department is a party in a case on appeal to the Supreme Court that hinges, in part, on the meaning of the word "utilized" in the Act's definition of advisory committees. I notice that the sponsors have seen fit to retain that word in the present bill. The Court's opinion may provide useful insights in this area. Depending on the timing, we may want to consider waiting to read the Court's decision this summer before final enactment of amendments to the Act.

Conclusion

In the meantime, Mr. Chairman, we look forward to continuing to work with the Committee to make significant improvements in the operation and management of Federal advisory committees. We appreciate your letter of support for this effort and the cooperation of your staff and of the GAO.

As you stated when you introduced this amendatory legislation, this Committee has held a number of valuable hearings on the question of managing and controlling Federal advisory committees, beginning in 1976. These hearings have served to focus much needed attention on the imperfections in the system, and have developed a record which provides a sound foundation for amending the Act. As a result, the time is ripe for a bill to be reported that will improve the advisory committee act. I have indicated our initial thoughts on portions of the present bill this morning. We are committed to working closely with you and your staff to ensure that the amendatory bill is one that we can wholeheartedly support. [END]

FOR RELEASE ON DELIVERY
Expected At 9:30 A.M.
Wednesday, March 15, 1989

Statement of Paul T. Weiss
Associate Administrator For Administration
U.S. General Services Administration
Before The Committee On Governmental Affairs
Of The Senate Of The United States
On The Federal Advisory Committee Act

Mr. Chairman, thank you for the opportunity to testify today on S. 444," *The Federal Advisory Committee Act Amendments of 1989*," and other matters related to the management of Federal advisory committees.

Accompanying me today is Mr. James L. Dean, Director of the General Services Administration's (GSA's) Committee Management Secretariat.

DISCUSSION OF S. 444

Mr. Chairman, our remarks before the Committee on October 5, 1988 included comments on S. 2721's provisions relating to the definition of an advisory committee; questions regarding what constituted a "meeting" under the Act; suggestions for clarifying the Act's "balanced" membership requirements; concerns over the coverage of advisory committee members under applicable Federal ethics statutes; and several options for improving the Act's administration. With regard to the latter, we supported the Committee's proposed amendment to permit cyclical, rather than annual, reviews of committee accomplishments; endorsed improvements in the maintenance of committee records and the reduction of certain reporting requirements; and, perhaps most important, underscored the significance of the proposed Bill's focus on reducing the number of Federal advisory committees created by statute.

I am pleased to note that S. 444, with limited exceptions, maintains the overall management thrust contained in the previous Bill.

Suggestions for Improving S. 444

We believe S. 444 would be improved through the adoption of the following suggestions:

- First, consistent with actions taken by GSA to strengthen management controls regarding the preparation of follow-up reports on recommendations produced by presidential advisory committees, proposed section 7 should be modified to cross-reference proposed section 9(b). Specifically, proposed section 7 should be amended to require that the charter of each presidential advisory committee include the name of the agency responsible for preparing the report required by proposed section 9(b).

Suggestions for Improving S. 444 (Continued)

- Second, proposed section 11(b) should be amended to strike the words "and advisory committee members" following "agency head " in the second sentence. GSA does not believe it is necessary to collect data from committee members in order to accomplish those review functions envisioned by the proposed Bill.

- Third, and finally, the requirement contained in proposed section 11(f), which permits GSA to include a summary of any material disagreements with agency heads within the annual summary report mandated by proposed section 9(d) should be modified. GSA recommends that this requirement be amended to permit the inclusion of the stated information within the report mandated by proposed section 11(d)(1). This shift would result in a more logical link between the analytical review function envisioned by proposed section 11(d), thereby assuring that a discussion of such "material disagreements" would be appropriately placed within the overall context of a given agency's efforts to improve its committee management operations.

RESPONSE TO RECOMMENDATIONS OFFERED BY THE GENERAL ACCOUNTING OFFICE

Mr. Chairman, in your invitation to appear before the Committee today, you asked for a status report on GSA's efforts to implement recommendations resulting from the General Accounting Office's (GAO's) October 1988 review of the Committee Management Secretariat (GGD 89-10). As you will recall, GAO offered several constructive comments relating to the establishment and renewal of advisory committees; the preparation of the *Annual Report of the President on Federal Advisory Committees*; the conduct of the Annual Comprehensive Review; and, the provision of follow-up reports on the recommendations made by presidential advisory committees, as required by section 6(b) of FACA.

I am pleased to note that we have made substantial progress in addressing each of GAO's recommendations. Specifically:

- The Committee Management Secretariat has completed the first phase of its efforts to design standard forms for use in conjunction with the establishment and renewal of advisory committees. A similar form has been designed for use in completing the Annual Comprehensive Review. Both will be tested following interagency review. Copies of each form have been provided to your staff for comment.

  Standardized consultation and reporting formats will help GSA and sponsoring organizations assure that each of the Act's requirements is addressed. At the same time, we expect that their use will assist in actually decreasing the amount of time required to process required documentation.

Response to GAO Recommendations (Continued)

- Actions taken by GSA during fiscal year 1988 to streamline the production of the *Annual Report of the President on Federal Advisory Committees* have paid off. The fiscal year 1988 report was completed by GSA on December 15, 1988 and transmitted by the President to Congress on January 3, 1989. This achievement represents a major improvement over past performance and we expect to meet the schedule established by Congress in the future.

- The Committee Management Secretariat's staff has been increased to include 5 full-time professionals, 2 part-time professionals, and 2 temporary part-time clerical support positions. This staffing level has resulted in more resources being directed toward each area identified by GAO for improvement.

- One of the new professional slots mentioned above is specifically focused on conducting, managing, and overseeing the Annual Comprehensive Review (ACR) mandated by section 7(b) of the Act. This year's effort, covering the results of committee activities undertaken during fiscal year 1988, is underway. We anticipate the issuance of a report to the President and Congress during May 1989, which will specifically outline the results of our review, including recommendations for the termination of advisory committees. This year's effort will be coordinated with the Office of Management and Budget (OMB) as part of the process specified by OMB Bulletin 89-08.

  Our report on the ACR will also include the type of analytical data earlier requested by Congress as part of the *Annual Report of the President on Federal Advisory Committees*. As indicated during the first part of our testimony, we believe specific management recommendations should be developed as part of the ACR in order to maximize their impact.

- GSA published a notice of proposed rulemaking on December 30, 1988 to address FACA's requirement for follow-up reports on the activities of presidential advisory committees (53 FR 53022). This action also addressed the Committee's concerns regarding the implementation of FACA's balanced membership provisions.

  The Committee Management Secretariat is in the process of drafting a Final Rule incorporating these changes. The Secretariat is also in the process of notifying all departments and agencies of overdue reports and tracking their responses to completion.

COORDINATION OF THE ANNUAL COMPREHENSIVE REVIEW WITH THE OFFICE OF MANAGEMENT AND BUDGET

Mr. Chairman, you asked that we provide our thoughts on the proper role of the Office of Management and Budget (OMB) with regard to the Annual Comprehensive Review (ACR) of Federal advisory committees. You also asked for our opinion with respect to OMB Bulletin 89-08, and steps which should be taken to assure the procedures stated therein do not result in higher consultant costs or undue delays in processing committee consultations.

OMB BULLETIN 89-08

OMB Bulletin 89-08, relating to the "Improved Management of Federal Advisory Committee Operations," was issued on December 23, 1988. The issuance is directed toward implementing many of the recommendations developed by the President's Council on Management Improvement (PCMI) as part of its 1988 *Review of Federal Advisory Committee Management*. At the same time, the Bulletin addresses the need to control committee costs through the identification of inactive and/or obsolete committees, as well as those groups who are performing low priority functions.

GSA supports the management objectives outlined in the Bulletin. At the same time, however, we view the process established by the issuance as a bridge toward the full implementation of FACA's requirement for an Annual Comprehensive Review by GSA. As stated earlier in this testimony, GSA is committed to the accomplishment of this function.

While the approach embodied in the Bulletin is primarily directed at reducing the number and costs of advisory committees, GSA's parallel effort will also review existing committees from a qualitative perspective. The final results of both efforts will be closely coordinated to assure that resulting reductions and management improvements do not produce undesirable secondary outcomes, such as unnecessary increases in consultant costs. In addition, the results of this joint effort will be continuously monitored by GSA to assure implementation of accepted recommendations.

An important part of GSA's and OMB's activities in this area will be to assure that related decisionmaking processes, such as those enumerated in OMB Circular A-120 (dealing with the use of consultants) and OMB Circular A-123 (regarding the application of management controls), are properly synchronized with FACA. As we mentioned during our previous remarks before the Committee, it is important that we approach the Act's requirements from a systemic perspective. Together, GSA and OMB can tap each other's expertise and resources to make sure this happens.

GSA'S RELATIONSHIP WITH OMB

GSA recognizes OMB's role with regard to governmentwide management and budgetary issues. As one of the Executive Branch's Central Management Agencies, we work closely and effectively with OMB in carrying out many initiatives of interest to GSA. Our intention is to work closely with OMB on implementing the Bulletin. We will also maintain an open dialogue with their staff regarding the effectiveness of the issuance as Federal agencies gain actual experience with its requirements.

GSA's Relationship With OMB (Continued)

As recommended by the President's Council on Management Improvement, GSA will vigorously pursue efforts to strengthen ties with OMB's budget and management staffs. We welcome their assistance in identifying opportunities for further management improvements, including the termination of inactive or low-priority advisory committees, efforts stemming from the Annual Comprehensive Review and other Executive Branch policies. While GSA will remain accountable for accomplishing FACA's objectives, OMB is viewed as a valuable and reliable partner in implementing the Act on a consistent basis.

GSA and OMB's relationship relative to the Act's implementation and other management initiatives will be outlined in greater detail in the plan under joint development to implement Bulletin 89-08. The plan, which will include detailed guidance to Federal agencies on the issuance, will be coordinated through GSA's Interagency Committee on Federal Advisory Committee Management. It will also be shared with the Senate Committee on Governmental Affairs.

Mr. Chairman, this concludes my remarks. I will be happy to address any questions the Committee may have.

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Federal Bar Association

STATEMENT OF BRIAN C. MURPHY, CHAIRPERSON, FEDERAL BAR ASSOCIATION SELECT COMMITTEE ON THE FEDERAL ADVISORY COMMITTEE ACT, BEFORE THE UNITED STATES SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, MARCH 15, 1989

Mr. Chairman, on behalf of the Select Committee on the Federal Advisory Committee Act of the Federal Bar Association, I thank you for giving me the opportunity to appear before you today. In accordance with your letter of invitation, I shall direct my comments to S. 444, the Federal Advisory Committee Act Amendments of 1989; to OMB's recent Bulletin 89-08 and the appropriate relationship OMB should have with GSA on advisory committee matters; and to OMB's announced goal of reducing the number and costs of advisory committees.

As I noted in our testimony last fall, the Select Committee is a diverse group made up of attorneys, committee management professionals and other persons who have had extensive experience with Federal advisory committees. When the Select Committee was established by the Federal Bar Association, the decision was made to strive for a balance of viewpoints. You will hear that diversity reflected today in these remarks.

Some members of the Select Committee will, I am sure, wish to supplement this statement with their individual written comments, especially in view of the fact that many of our members felt the need for more time to carefully review S.444. For example, Select Committee Vice Chairperson Michael H. Cardozo, who has previously testified before this Committee on FACA, has a separate statement dealing with "utilized" committees. I hope that such statements can be accommodated in the hearing record.

S. 444

At the outset, I would like to note that, although in our testimony I shall offer specific suggestions as to particular provisions and language, several members of the FBA Select Committee on FACA have reservations regarding S. 444. Overall, in our view, the bill raises a number of issues that still need resolution. These include the definition of "subcommittee;" the application of FACA to "utilized" committees; and certain chartering issues, including the relationship between agencies and the General Services Administration. Not all of our members agree on every one of these points, but they do largely represent areas of consensus. Of course, we would be pleased to work with the Committee on Governmental Affairs staff to clarify any of our positions and to assist in any way that you deem appropriate.

I would like to turn now to the text of S. 444.

We note that you have crafted an exemption in Section 4(1)(C)(iv) to permit meetings among Federal, state and local government officials. This was an exemption which many members of the Select Committee advocated in our testimony last October. As you know, Mr. Henry Jasny, of the Center for Auto Safety, who has been an active participant in the deliberations of the FBA Select Committee, and who is testifying today, has taken strong exception to this exemption. Many of the members of the Select Committee, however, welcome the exemption as the resolution of a very practical problem--that of the great need felt by many Federal agencies to conduct business and consult with state and local government officials. In fact, several members of the Select Committee urge that the exemption be broadened to exclude such meetings, whether or not they are required by statute. This could be accomplished by the deletion of the words "are required by statute to" from the section.

In Section 4(2), several members of the Select Committee have expressed concern about the definition of "subcommittee". I appreciate that this formulation reflects concerns cited by the Select Committee in our testimony last October. However, we are concerned now about the breadth of this definition in extending the coverage of all the requirements of FACA to every subcommittee. It is our view that the full application of FACA's requirements is not necessary for subcommittees that report to or through a parent advisory committee that would itself be subject to full FACA coverage. Accordingly, we suggest that the language of Section 4(2), beginning with, "which is authorized to act on behalf of...Government", be deleted in favor of, "which is authorized to take action independently without reporting through the parent committee."

Speaking personally, and not necessarily for the Select Committee, I believe that the definition of "meeting", immediately following the definition of "subcommittee," in Section 4(2), is a very useful formulation which will help discourage abusive practices. I do suggest, however, the substitution of "involving" for "between" in the second line of the definition in order to emphasize that it is not just the number of advisory committee members that determines whether a meeting has taken place, but the degree of actual authority of the persons acting for the committee.

We feel that use of the term "utilized" throughout the bill may cause considerable difficulties. As a practical matter, some Federal agencies call upon groups that were pre-existing, and which were not established expressly to advise the agency. In many cases, such groups have hundreds of members, many of whom may attend only one meeting during the year, while others from the group may attend at other times, with the agency not knowing in advance who will attend which meeting.

Mr. Chairman, some members of the Select Committee are concerned about the seeming duplication of responsibilities imposed on individual Federal agencies and on the General Services Administration by new Section 10(a)(2) and new Section 11(c). New Section 10(a)(2) calls for each agency head to conduct annual reviews of committees to ensure compliance with the Act, while new Section 11 (c) similarly requires the Administrator of General Services to determine whether committees in agencies are in compliance with the requirements of the Act. Some of our members question the necessity for new Section 11(c), especially in view of new Section 11(f), which provides that, if there is disagreement between the Administrator and an agency head, the agency head shall have final authority.

In new Section 10(c)(5), we very much welcome the reference to Federal ethics rules and conflict of interest statutes. The bill provides that each agency head shall require members of each committee established or utilized to adhere to certain ethics rules and conflict of interest statutes relating to disclosure. As a practical matter, however, It would be very difficult for the agency to implement a requirement that disclosure statements be filed for such persons, who, as mentioned above, may number in the hundreds and who may attend just one meeting. Similarly, in new Section 10(d)(3), the use of the term "utilized" raises practical hurdles for many agencies in supplying the names and occupations of the current members of utilized committees, when submitting their annual reports to the administrator of GSA. We suggest that the special challenges presented by utilized committees be addressed in the bill.

In new Section 10(e)(4), the advisory committee management officer is given the responsibility to coordinate with the designated agency ethics official to ensure appropriate ethics counseling and timely completion of any written disclosure obligations. The Select Committee considers that this is more appropriately a responsibility of an agency's designated Federal official. We therefore recommend that new Section 10(e)(4) be moved to new Section 12(f)(1), where it would be added as new Paragraph (E).

A number of our members are also concerned about the interrelationship between FACA and the Sunshine Act in the bill, in the context of the protection of records. New Section 12(c)(1) requires working papers and drafts to be made available for public inspection and copying at the time the records are distributed to the advisory committee members. In the view of many of our members, this is likely to impose a substantial paperwork burden on Federal agencies that may outweigh the benefits of immediate public access to the drafts and working papers. A return to the formulation in Section 10(b) of the current law seems preferable, which requires that the same documents be made available for public inspection and copying, but not on a concurrent basis with release to committee members.

Concomitantly, we recommend a phrase change in new Section 12(c)(1), from "Subject to," to "Except as provided in", and the insertion of the conjunctive "and". This change would emphasize that the protections accorded in section 552 of title 5 still apply in S. 444.

The suggested paragraph would then read:

> "(c)(1) Except as provided in section 552 of title 5, United States Code, records which were made available to or prepared for or by each advisory committee, including reports, transcripts, minutes, appendixes, working papers, drafts, studies, agendas, or other documents, shall be considered created by the committee, and such records shall be available for public inspection and copying."

Mr. Chairman, we are particularly pleased with the authority granted in Section 9 to the President or an agency head to abolish advisory committees established by statute. We consider this to be a most helpful step in assuring appropriate executive control over the costs and usage of advisory committees.

In view of this attention to statutory advisory committees, however, it seems to some members of the Select Committee that there is a diminution in the responsibilities of Congressional committees for legislative and oversight functions. We note in new Section 8 that each standing committee of the Senate and House of Representatives may review the activities of each advisory committee under its jurisdiction. Section 5(a) of the current law provides that these bodies shall make a continuing review of the activities of each advisory committee under its jurisdiction, which seems to be a preferable formulation to avoid any lessening of Congressional oversight.

Mr. Chairman, as I mentioned above, we would be pleased to elaborate on any of these points with your staff.

OMB Bulletin 89-08 and the Relationship Between OMB and GSA

Mr. Chairman, you have asked for comment on OMB's recent Bulletin 89-08, dealing with Improved Management of Federal Advisory Committee Operations, and for recommendations as to the type of permanent relationship GSA should have with OMB concerning the establishment of any advisory committee proposed by an agency head, as well as recommendations for ensuring that OMB's proposed review function will not unduly delay the establishment process.

With regard to OMB Bulletin 89-08, the Select Committee understands that OMB will review, prior to establishment, any advisory committee proposed by a department or agency in the Executive Branch, for consistency with the President's policy and management objectives. This review is to include the mission, duration, status of implementation, funding, and personnel levels of each proposed advisory committee.

The Select Committee is concerned about OMB's determination to become involved again, as it once was, in the review of advisory committee budgets and in committee establishments, renewals and terminations. As the Select Committee wrote to Mr. Joseph R. Wright on January 11, 1989, in his role as chairman of the President's Council on Management Improvement, we believe that this is a significant step backward from improved management of Federal advisory committee operations. [copy attached]

This diffusion of responsibility for advisory committee management will, in our view, likely result in additional burdens being placed on Federal agencies, which may once again have to postpone essential action on urgent tasks while awaiting the approval of busy OMB staffers who may place a low priority on Federal advisory committee matters.

We have previously testified about the delays caused by the dual review process involving both GSA and OMB. Sometimes it took months to complete the consultation process. We understand that some agencies circumvented the Act to avoid the red-tape obstacles connected with chartering through the GSA/OMB consultation process. Currently, GSA operates the consultation process in a streamlined way, and the overwhelming majority of consultations are completed within 15 days. I am sure that you will agree, Mr. Chairman, that it would be undesirable to return to the long delays of the past. Yet, this could occur if OMB does not work very closely indeed with GSA in the agency consultation process.

We are also concerned about the requirement in OMB Bulletin 89-08 that GSA develop a system of quarterly reports on operating activities, appointments and organizational matters relating to the establishment, continuation, renewal, or reestablishment of advisory committees. This is not a requirement imposed by FACA and will, in our view, be highly resource-intensive and costly to taxpayers, without providing commensurate benefits.

Former Representative John S. Monagan, who introduced the bill in the House of Representatives that eventually became the Federal Advisory Committee Act, seemed to be speaking about these kinds of problems when he commented, at an FBA educational program on FACA, that:

"I abhor the idea that this legislation [FACA] may be used...to delay government action, that a branch of the Executive may use it to hold up action which another branch thinks is desirable. That certainly is far from the objective of stimulating economy and efficiency in government." [Transcript of Seminar on Federal Advisory Committee Act, Federal Bar Association, September 25, 1986, 5, copy attached]

For these reasons, the Federal Bar Association Select Committee on FACA respectfully urges the Committee to support a streamlined consultation process.

As a personal note, I would like to mention that I have had several dealings with OMB at the staff level, which have led me to conclude that key OMB careerists recognize the negatives that I have outlined above and reflect a determination to minimize them as much as possible. Nonetheless, we look forward to the sunsetting of OMB Bulletin 89-08.

OMB's Goal of Reducing the Numbers and Costs of Advisory Committees

Mr. Chairman, you have also asked about our reaction to OMB's stated goal of reducing the numbers and costs of advisory committees which are created by the Executive Branch and by statute. I assume that you are referring to OMB's suggestion in its letter dated January 25, 1989, from OMB Associate Director for Management Gerald R. Riso, to the Honorable John J. Franke, Jr., Acting Vice Chairman of the President's Council on Management Improvement, that the three agencies with the largest number of advisory committees (HHS-259, Interior--153, and National Science Foundation--71) should establish senior level task forces that have goals to eliminate over 25 percent of their committees. [copy attached]

In our letter of February 23, 1989 to OMB Director Richard G. Darman, the Select Committee went on record as being opposed to an across-the-board reduction in the numbers of advisory committees, taking sharp issue with an approach that focuses only on numbers, [copy attached]

While, of course, we do not assert that all advisory committees are worthy of retention indefinitely, we feel that any decision on the advisability of retaining or eliminating advisory committees should be made on a case-by-case basis.

Groups such as the Kettering Foundation, in its report on "The Utilization and Management of Federal Advisory Committees," have found advisory committees to be highly cost-effective vehicles for providing government officials with expert guidance and advice--

usually at a fraction of what private consultants would cost. [Report of the Charles F. Kettering Foundation, by Richard A. Wegman, Esquire, June 1983]

Furthermore, we agree with you, Mr. Chairman, that "the story of the Federal Advisory Committee Act is not contained in the number of committees or their costs or the numbers of people involved." [Hearing before the Committee on Governmental Affairs, United States Senate, One Hundredth Congress, First Session, December 3, 1987, S. Hrg. 100-538, 2] We have found that, when oversight involves a "numbers game," it tends to lead to circumvention of the Act.

Accordingly, we believe that OMB's call for a 25 percent reduction at the three agencies is inappropriate, and we respectfully urge you, Mr. Chairman, not to support indiscriminate, across-the-board reductions in the numbers of advisory committees.

You have identified a very real problem in your expressed concern about the replacement of these advisory committees with higher-priced individual consultants. The only certain way to avoid that likely hazard is to nullify the suggested across-the-board reduction.

Mr. Chairman, it has been a privilege to represent the Federal Bar Association Select Committee with this testimony today. I thank you very much indeed for the opportunity.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

DEC 23 1988

OMB BULLETIN NO. 89-08

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Improved Management of Federal Advisory Committee Operations

1. Purpose. This Bulletin provides guidance and instructions to selected agencies in strengthening the management, oversight, and operations of Federal advisory committees.

2. Authority. The Federal Advisory Committee Act, as amended; the Budget and Accounting Act of 1921; the Budget and Accounting Procedures Act of 1950, as amended; and Executive Order No. 12024, December 1, 1977.

3. Background. The President's Council on Management Improvement (PCMI) recently conducted a follow-up study of Federal Advisory Committee management to determine the extent to which departments and agencies had responded to the President's 198[illegible] call for management improvements and recommendations contained in the PCMI's 1985 report. The review indicated that while the majority of those Federal departments and agencies sponsoring significant numbers of advisory committees have taken action to control committee costs and operations, opportunities for further improvement exist.

4. Definitions. For purposes of the bulletin, definitions for "advisory committee," "agency," "committee member" or others are the same as defined in 41 CFR 101-6.1003.

5. Actions required. The Heads of all Departments and agencies sponsoring Federal advisory committees will:

(A) Review the adequacy of their advisory committee management program, with particular emphasis on the following:

- Documenting accomplishments and results of existing advisory committees;
- Assuring that officials responsible for ongoing management of Federal advisory committees receive adequate guidance on existing management and budget policies; and

- Assuring that advisory committee members receive adequate information and guidance regarding travel cost-saving opportunities and policies on employment and compensation of consultants, and requirements to adhere to the regulations issued by the Office of Government Ethics, relating to the avoidance of conflict of interest.

These actions will take into consideration all problems identified through any past or ongoing internal management reviews, such as those which may be the result of internal Inspector General audits, recommendations made for improvement by the General Services Administration (GSA) as part of its Annual Comprehensive Review function, or audits conducted by the General Accounting Office (GAO).

(B) Assure that proposals for the establishment, funding, renewal, or reestablishment of Federal advisory committees fully comply with requirements issued by the Office of Management and Budget and the General Services Administration in OMB Bulletins and Circulars and agency regulations. As a followup to the the President's 1990 budget, each agency should submit by March 15, 1989, a listing of its statutory and other advisory committees, together with a recommendation for each committee's continuation with fewer resources or termination if a critical need is no longer present.

(C) In addition, all departments and agencies sponsoring ten or more advisory committees, or whose committee budgets exceed $500,000, will evaluate their advisory committee management programs under internal control guidelines established by OMB Circular No. A-123 ("Internal Control Systems").

6. Responsibilities of the Office of Management and Budget. The Office of Management and Budget will:

(A) Review, prior to establishment, any advisory committee proposed by any department or agency in the executive branch for consistency with the President's policy and management objectives. This review shall include the mission, duration, status of implementation, funding and personnel levels of each proposed advisory committee.

(B) Review the plan and system to be developed by GSA to coordinate and integrate GSA's Annual Comprehensive Review of all Federal advisory committees into the OMB budget and management review processes. This will include the provision of quarterly reports on operating activities, appointments, and organizational matters relating to the establishment, continuation, renewal, or reestablishment of advisory committees.

(C) As a followup to the President's 1990 budget, each OMB examiner will review the purpose, objectives and funding levels of assigned advisory committees. This review will be reflected in budget recommendations for the continuation or termination of each advisory committee. Where critical needs are no longer present or of high priority, termination will be recommended. Where continuation is recommended, attention will be paid to reducing personnel and other overhead costs as much as possible. Recommendations to terminate advisory committees that are statutory in origin will be accompanied by appropriate legislative proposals to be transmitted to the Congress in an omnibus advisory committee termination bill.

(D) Review the section of the Agencies' FY 1988 Federal Managers' Financial Integrity Act Reports which will (1) describe the steps taken to implement OMB Circular No. A-120, as revised, ("Guidelines for the Use of Advisory and Assistance Services"), and (2) indicate what reviews were performed or planned of the control systems set forth in paragraph 8 of the Circular.

7. Responsibilities of the General Services Administration. In addition to developing the plan and system described above, the General Services Administration will:

(A) Continue to carry out its delegated responsibilities for Governmentwide advisory committee management under the provisions of E.O. 12024 including preparation of the President's Annual Report to the Congress and other functions in the Federal Advisory Committee Act.

(B) Assure that agency proposals supporting the establishment or continuation of Federal advisory committees are approved by the Heads of Executive Branch Departments and agencies, as required by the Federal Advisory Committee Act. Those determinations must incorporate the appropriate policy level review between sponsoring organizations and OMB as described above.

8. Information contact. Questions about this bulletin should be directed to OMB's Government Operations Division; Bill McQuaid on 395-5090. Questions regarding information to be supplied to GSA in support of section 7 should be directed to GSA's Committee Management Secretariat; Jim Dean on 523-4884.

9. Sunset date. This Bulletin expires August 31, 1989.

Joseph R. Wright, Jr.
Director

Paul Weiss, GSA ✓

cc: Jim Dean

PCMI
President's Council on Management Improvement

JAN 13 1989

The Honorable
Joseph R. Wright, Jr.
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Wright:

On December 23, 1988, the Office of Management and Budget (OMB) issued a Bulletin dealing with the "Improved Management of Federal Advisory Committee Operations." As a result of concerns raised by a significant number of Federal departments and agencies regarding the issuances, the Bulletin's provisions were discussed at the January 12 session of the President's Council on Management Improvement (PCMI).

Based upon this review, the PCMI unanimously voted to recommend the rescission of OMB Bulletin 89-08 as soon as possible. The PCMI believes the issuance will adversely affect the efficient operations of Federal advisory committees through the imposition of additional and unwarranted reporting requirements. In addition, it is the consensus of the PCMI membership that the Bulletin will seriously hamper efforts undertaken by the General Services Administration (GSA) to implement those recommendations contained in the PCMI's March 1988 review of Federal advisory committee management.

The PCMI shares OMB's concern about the proliferation and proper management of committees. In this regard they support continuing to focus the management improvement efforts in this area through GSA. This will assure a consistent approach in identifying and resolving outstanding issues. GSA has established an effective interagency process for implementing needed improvements and the PCMI believes these efforts should not be duplicated or otherwise augmented by OMB.

In summary, the PCMI strongly recommends that you take appropriate action to rescind OMB Bulletin 89-08 in the interest of improved Federal management.

Sincerely,

John Franke jr

JOHN J. FRANKE, JR.
Acting Vice Chairman
President's Council on
Management Improvement

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JAN 25 1989

Honorable John J. Franke, Jr.
Acting Vice Chairman
President's Council on Management Improvement
Department of Agriculture
Washington, D.C. 20250

Dear John:

This is in response to your letter of January 13, 1989, concerning advisory committees. As Acting Vice Chairman of the President's Council on Management Improvement (PCMI), you transmitted the Council's recommendation that the Office of Management and Budget rescind OMB Bulletin No. 89-08. We cannot agree with the PCMI view.

The PCMI's report on Review of Federal Advisory Committee Management called for increased coordination with OMB on oversight of advisory committees. After that report, Senators Glenn and Levin, Chairman and Sub-Committee Chairman of the Governmental Affairs Committee, requested that we testify on the role of OMB in preventing or terminating unnecessary advisory committees, including those established by statute. In our testimony, we said that "OMB uses the budget process as a means of reviewing whether an agency has a need for a particular committee...." We also have had discussions with the Counsel for the Senate Committee on Governmental Affairs, Lorraine Lewis, on OMB Bulletin No. 89-08.

The General Accounting Office (GAO) testified at the same time that we testified. Since the hearing, we have reviewed the GAO report on this subject and concur in GAO's conclusion that "GSA has not accomplished its advisory committee responsibilities required by FACA." The justifications for new and existing committees were inadequate and the reviews based on them resulted in far more committees than the Government should have. OMB Bulletin No. 89-08 deals with some of the problem areas identified by GAO in its testimony and report.

In the processing of OMB Bulletin 89-08, we shared several drafts with GSA staff and incorporated their comments on more than one occasion. In addition, we met with GSA's Associate Administrator for Administration, Paul Weiss, on this Bulletin. You will also recall that we discussed this Bulletin with the PCMI Executive Committee prior to its release.

OMB Bulletin No. 89-08 represents the correct course in this area and we do not intend to rescind the Bulletin. We do not believe that the executive branch needs almost 1,000 advisory committees. We suggest that the three agencies with the largest number of advisory committees and over half of the Government's total (HHS-259, DOI-153, and NSF-71), should establish senior level task forces that have goals to eliminate over 25 percent of their committees.

We will continue to closely coordinate with GSA and the Interagency Committee on Federal Advisory Committee Management. We are requesting the full cooperation of all agencies with advisory committees in fully implementing OMB Bulletin No. 89-08.

Sincerely,

(Sgd.) Gerald R. Riso

Gerald R. Riso
Associate Director
for Management

Federal Bar Association

February 23, 1989

Honorable Richard G. Darman
Director
Office of Management and Budget
Room 252, OEOB
Washington, D.C. 20503

Dear Mr. Darman:

Senior Management Analyst Bill McQuaid has furnished us a copy of the OMB response of January 25, 1989 to Mr. John J. Franke, Jr., Vice Chairman of the President's Council on Management Improvement, regarding OMB Bulletin 89-08, in which it was suggested that the Executive Branch does not need almost 1,000 advisory committees. The letter suggested that the three agencies with the largest number of advisory committees and over half of the government's total (HHS-259, DOI-153, and NSF-71) should establish senior level task forces that have goals to eliminate over 25 percent of their committees.

The FBA Select Committee on the Federal Advisory Committee Act (FACA) would like to go on record as being strongly opposed to an across-the-board 25 percent reduction in Federal advisory committees at these three agencies. We take sharp issue with an approach that focuses only on numbers. While we do not assert that all advisory committees are worthy of retention indefinitely, nevertheless, we maintain that any intelligent analysis as to the advisability of retaining or eliminating advisory committees must be approached and rooted on an individual case basis, such as the General Accounting Office proposal to review the need for those advisory committees that have not met for extended periods.

Groups, such as the Kettering Foundation in its report entitled, "The Utilization and Management of Federal Advisory Committees," have found advisory committees to be highly cost-effective vehicles for providing government officials with expert guidance and advice -- usually at a fraction of what private consultants would cost. Federal advisory committees provide a means by which the best minds and experience available in all fields of business, government, science, and the other professions are made available to the Federal Government at modest cost.

We agree with Senator Glenn, Chairman of the Senate Committee on Governmental Affairs, who has stated that, "the story of FACA is not contained in the number of committees or their costs or the numbers of people involved." From past experience, we have found that, when oversight involves a "numbers game," it tends to lead to circumvention of the Act.

For these reasons, we respectfully urge you to reconsider the OMB's call for a 25 percent across-the-board reduction in the number of advisory committees at HHS, DOI, and NSF.

In accordance with our letter of January 11 (copy enclosed) to then-Director of OMB Joe Wright, we are still very concerned about the burdens of implementing OMB 89-08. We look forward to working with Bill McQuaid in helping to resolve our differences on these issues.

Thank you.

Sincerely,

Brian C. Murphy
Chairperson
Select Committee on the Federal Advisory Committee Act

Enclosure

Federal Bar Association

January 11, 1989

The Honorable Joseph R. Wright
Chairman
President's Council on Management Improvement
Office of Management and Budget
Washington, D.C.20503

Dear Mr. Chairman:

On behalf of the Federal Bar Association Select Committee on the Federal Advisory Committee Act (FACA), I am writing to express concern about OMB Bulletin No. 89-08, "Improved Management of Federal Advisory Committee Operations" (December 23, 1988).

The Select Committee on FACA is comprised of persons with considerable legal and management experience in dealing with issues arising under FACA, and includes representatives from the U.S. Government (both retired and currrently in service), the private bar, and public interest groups.

In the past, the Select Committee has commented extensively on proposed agency regulations on FACA, testified before the Congress, conducted educational programs on the act, and sponsored publications to broaden public knowledge about the importance of the Federal advisory committee system. The Select Committee has benefited from discussions about FACA with former PCMI Vice Chairperson Howard Messner and with officials from GSA and OMB having direct responsibility for FACA management and oversight.

One of the problems identified in the past by the Select Committee was the dual review conducted by OMB and GSA during the lengthy consultation process for the establishment and/or renewal of Federal advisory committees. Sometimes it took months to complete the consultation process, at least in part because of the low priority given to the review by OMB budget examiners. Some agencies circumvented the act to avoid the red-tape obstacles connected with chartering through the GSA/OMB consultation process.

Recently, however, the consultation process has been streamlined by the GSA Committee Management Secretariat, which has eliminated the dual review by both GSA and OMB. Now the overwhelming majority of consultations are completed within 15 days.

But, under OMB Bulletin 89-08, OMB apparently will review, prior to establishment, any advisory committee proposed by a department or agency in the Executive Branch, for consistency with the President's policy and management objectives. The Select Committee is concerned about OMB's determination to become involved again in the review of advisory committee budgets and in committee establishments, renewals and terminations. We believe this to be a significant step backward from improved management of Federal advisory committee operations.

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This bifurcation of responsibility will likely result in additional burdens on Federal agencies, which once again may have to postpone essential action on important and time-sensitive projects while awaiting the approval of busy OMB staffers who place a low priority on Federal advisory committee matters.

Members of the Select Committee feel that GSA, through its Committee Management Secretariat, is now performing a useful and effective service in managing the Federal advisory committee process. OMB Bulletin No. 89-08 would seriously undercut the effective exercise of Federal advisory committee management by bifurcating the single line of management authority necessary for efficient operation and oversight of the system. In our view, it is not appropriate to have two distinct management centers performing overlapping functions.

Accordingly, in keeping with the transfer of authority for Federal advisory committee management from OMB to GSA by Executive Order 12024, dated December 1, 1977, the Select Committee feels that the management responsibility should not be bifurcated between GSA and OMB.

A related concern is the requirement in OMB Bulletin 89-08 that GSA develop a system of quarterly reports on operating activities, appointments and organizational matters relating to the establishment, continuation, renewal, or reestablishment of advisory committees. This is not a requirement imposed by FACA.

It seems particularly inappropriate that an Administration so determined to eliminate unnecessary reporting requirements and improve government efficiency would create such an unnecessary and expensive paperwork burden as the quarterly reporting requirement. The requirement is not necessary under the act nor will it promote effective Federal advisory committee management.

Accordingly, the Federal Bar Association Select Committee on the Federal Advisory Committee Act respectfully urges the President's Council on Management Improvement to recommend the rescission of OMB Bulletin 89-08.

Thank you.

Sincerely,

Brian C. Murphy

Chairperson

Select Committee on the Federal Advisory Committee Act

Federal Bar Association

April 6, 1989

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20530

Dear Mr. Chairman:

I am pleased to have the opportunity to supplement the testimony which I was privileged to give on March 15, 1989 on behalf of the Federal Bar Association Select Committee on the Federal Advisory Committee Act, concerning S. 444, the Federal Advisory Committee Act Amendments of 1989. I believe that the following comments are consistent with that testimony.

The Distinctive Characteristics of "Established" vs. "Utilized" Committees

The Select Committee feels that different standards should be applied to "established" and "utilized" advisory committees because of the significant differences in the characteristics of these two kinds of committees. Beyond the requirement of openness, it is not clear to us what provisions of FACA should apply uniformly to both types of committees. One court has expressed uncertainty as to whether FACA's balanced membership requirement can be applied to groups that are utilized instead of established by an agency. See Washington Legal Foundation Foundation v. U. S. Department of Justice, 691 F. Supp. 483, 485, n. 5 (D.D.C. 1988), prob. juris. noted, 109 S.Ct. 526 (December 5, 1988). Furthermore, as a practical matter, a "committee" that is not established by an agency may not be "utilized" by a government agency until its meetings are long past, its report completed, and its members no longer involved. The requirements of FACA cannot be observed retroactively. To charge the members with violations of law when they had no way of knowing that the law would apply would make no sense.

Accordingly, the Select Committee recommends that the separate concepts of "established" and "utilized" be treated separately in S. 444, imposing on each committee only those requirements that are appropriate for that type of advisory committee. It would also be useful to include a definition of the term "utilized" in the statute, and we feel that the one set forth in GSA's regulations, at 41 CFR 101-6.1003 (52 Fed. Reg. 45926, 45930, December 2, 1987), is instructive.

Disclosure Requirements

Proposed Section 10(c)(5) of the bill requires all Federal employees to disclose in writing an financial or other interest which may be affected by the work of a committee, or which creates the appearance of a conflict of interest. The Select Committee believes that a simplified short-form disclosure statement should be used, which reports: (1) any substantial financial interest a person may have in the

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committee's work, and (2) any affiliation the person may have relevant to service on the committee. We support an exemption from the disclosure requirement for committees without fixed membership. It may also be helpful to authorize agencies to require fuller disclosure when they deem it to be appropriate.

Fair Balance

Several sections of S. 444 address the issue of balanced representation on Federal advisory committees. (See, for example, sections 3(1) and 7(3)). The Select Committee strongly favors the application of a practical, definable standard. Without it, the balanced membership requirement will continue to plague the courts, agencies and the public alike.

In order to establish a workable, balanced representation requirement, some members of the Select Committee feel that there should be a statutory delegation to GSA to develop a standard through its advisory committee management procedures. Accordingly, the Select Committee recommends that the Committee on Governmental Affairs re-evaluate this issue. Of course, we would be pleased to work with your staff on this matter.

Availability of Records

Proposed Section 12(a)(1) of S. 444 provides that, subject to the terms of the Freedom of Information Act, 5 U.S.C. Section 552(b), records which were made available to or prepared for or by an advisory committee, including materials such as reports, working papers, drafts, and studies, must be made available for public inspection and copying at the time the records are distributed to the advisory committee members.

In the view of the Select Committee, the extent of intended protection of materials used by an advisory committee in its work is not clear. We presume that only materials that are not exempt under 5 U.S.C. Section 552(b) would be made available to the public, but clarification by the Governmental Affairs Committee would be helpful.

Federal Personnel Classification of Advisory Committee Members

Although the term "special government employee" is not expressly used in S. 444, the term "Federal employee," which appears in several sections of the bill (see, for example, proposed sections 7(a)(7) and 9(c)(2)(B)), seems to embody the concept. Members of the Select Committee consider that the designation "special government employee" (SGE) should not be applied to advisory committee members, because of the widespread confusion about the meaning of the term and because of the potential application of the U.S. Criminal Code to advisory committee members who are classified as SGE's.

Under 18 U.S.C. Section 205 (1982), a special government employee may not engage in or be compensated for representational activities before Federal agencies or, in some cases, the courts, in any particular matter involving specific parties in which he or she had been personally and substantially involved as a Federal employee. The sanctions can be severe: $10,000 fine, or imprisonment for not more than two years, or both.

Members of the Select Committee believe that, under ordinary circumstances, persons serving on advisory committees should not be subject to criminal sanctions, solely by virtue of their participation on such committees. This exposure, if clearly understood, could have a substantial chilling effect on persons contemplating service on advisory committees.

We suggest a return to the distinct Federal personnel classification of "Federal advisory committee member." This would permit the application of appropriate standards of conduct and concomitant sanctions for violations, without forcing Federal advisory committee members into a Federal personnel classification scheme which simply does not fit and which discourages service on Federal advisory committees.

The Select Committee would be pleased to discuss these matters with your staff. Thank you for the opportunity to comment.

Sincerely,

Brian C. Murphy
Chairperson
Select Committee on the
Federal Advisory Committee Act

STATEMENT of RICHARD K. BERG
CONSULTANT to the ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
before the SENATE GOVERNMENTAL AFFAIRS COMMITTEE

March 15, 1989

I appreciate the opportunity to testify here today. My name is Richard K. Berg. I am associated with a Washington law firm, Multinational Legal Services, P.C. Before I left the Government in 1987, I was for sixteen years Executive Secretary and General Counsel of the Administrative Conference of the United States. I have been engaged as a consultant to the Conference to prepare a report on the subject of conflict of interest requirements for members of Federal advisory committees. A draft report I have submitted is being considered by the Conference's Special Committee on Ethics in Government. The draft has been circulated for comment, and the staff of your Committee has asked me to appear here today to discuss my conclusions and recommendations. I must emphasize that my draft report has not been adopted or approved by the Administrative Conference, and the views I express are my own and not necessarily those of the Conference.

The problem of conflict of interest requirements for Federal advisory committee members involves the interaction of three distinct bodies of law - the Federal Advisory Committee Act (FACA), the conflict of interest laws, in particular, 18 U.S.C. §§ 201-219, and the Federal personnel statutes and regulations. None of these statutory schemes was designed specifically to deal with conflict-of-interest standards for members of advisory committees, and as a consequence the rules and practices that have developed from the interaction of these three bodies of law contain anomalies and irrationalities which arise from applying classifications and distinctions which seem to have little or nothing to do with the question of what standards should be applied to such advisers.

Statutory Framework

The Federal Advisory Committee Act, 5 U.S.C. App. §§1-15, is, of course, the principal focus of this Committee's concern. Enacted in 1972, FACA regulates the establishment, operation and use of advisory committees by the Federal Government.

The Act's definition of "advisory committee" is very broad. It has four key elements. The Act covers (1) any committee or similar group, (2) whose members include one or more individuals who are not full-time Federal employees, (3) established or utilized by the President or a Federal Agency, (4) in the interest of obtaining advice or recommendations.

The FACA was passed to address a variety of criticisms that had been levelled at the operation of advisory committees in the past, that there were too many committees, that some did too much and others too little, that there was insufficient agency control of their activities, insufficient review of their effectiveness, and insufficient follow-up on their recommendations, that advisory committees were not fairly balanced in their membership, and that there was too little public access to their deliberations or to the results of their work. These were, I believe, the principal complaints, and FACA contains provisions addressed to each of them. Specifically, FACA requires that committees be balanced in their membership, and it has a requirement for open committee meetings which anticipated by four years the provisions of the Government in the Sunshine Act. In addition, FACA has tough managerial controls to ensure that agencies adequately monitor the activities of their committees and that duplicative, unproductive, or otherwise unnecessary committees are terminated or, better still, not set up in the first place.

FACA does not contain provisions dealing with committee members' conflicts of interest. It does not purport to say in what circumstances it would be inappropriate for a member to participate or even what disclosure of private interests should be made. It might be argued that FACA adopts an alternative approach for obtaining objective advice by requiring that the membership of committees be "fairly balanced in terms of the points of view represented."

We may assume that the drafters of FACA were aware of the general framework of legal requirements governing conflicts of interest of advisers to the Government. The most significant of these requirements are found in 18 U.S.C. Chapter 11, §§201-219, which was enacted in 1962 as a general revision of the conflict of interest laws applicable to Federal employees. The Chapter is headed, Bribery, Graft and Conflicts of Interest, and these are criminal provisions, which carry heavy potential penalties.

One of the principal purposes of the 1962 revision, P.L. 87-849, was to distinguish for purposes of conflict-of-interest requirements between full-time Federal employees and "those who serve the Government intermittently or for a short period of time." These temporary or intermittent employees were placed in a new category, special Government employees (SGE's), for purposes of the conflict of interest laws and were relieved of some of the prohibitions applicable to full-time employees.

Many advisory committee members are special Government employees under the rulings of the Office of Personnel Management and its predecessor, the Civil Service Commission, and under the opinions of the Department of Justice. As SGE's, even if they serve without compensation, they are subject to the applicable provisions of Chapter 11. These provisions are complicated and I shall not review them in detail. By far the most significant for our purposes is 18 U.S.C. §208, which makes it a criminal offense to participate "personally and substantially" as a Government employee "through decision, *** recommendation, the rendering of advice, investigation, or otherwise in *** any particular matter in which to his knowledge, he, his spouse, minor child, partner, organization *** has a financial interest."

Section 208 is especially broad in several respects. "Particular matter" is not qualified by the words "involving a specific party or parties," as it is in various other provisions of Chapter 11, and it is interpreted to cover matters of broad applicability, such as agency rules. Under Department of Justice opinions the test of whether a financial interest exists with respect to the matter is simply whether the Government action or decision in which the employee participates will have a "direct and predictable effect" on the entity in question. Second, the participation which is forbidden includes the rendering of advice. Third, the range of financial interests it reaches is broad, and there is in the statute no de minimis exception. Fourth, section 208 is violated whether or not the employee's action furthers or is likely to further his financial interest. The crime consists of his participation in the presence of a known conflict.

Because of the breadth of section 208 Congress recognized that the statute could not always be applied literally. Accordingly, section 208 (b) provides that waivers may be granted by the employing agency (1) in particular cases where the appointing official makes a written determination that the employee's interest is not so substantial as to affect the integrity of his services, or (2) where the agency by general rule exempts certain interests as too remote or inconsequential.

The waiver provisions are of particular significance to advisory committee members. Any SGE who serves on an advisory committee which is making a recommendation respecting a rule or policy that would affect the industry to which he has financial or employment ties would be bound to recuse himself unless he received a waiver. The Federal Personnel Manual specifically encourages the use of waivers where "the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization." FPM, p.735-C-4. I shall discuss later in my testimony why the availability of section 208(b) waivers, while helpful, does not appear to be a satisfactory answer to the problem.

In addition to the criminal provisions of 18 U.S.C. Chapter 11, SGE's are subject to certain requirements for financial disclosure. All SGE's are required by Executive Order 11222 and OPM regulations to file a confidential statement of other employment and other affiliations, such as trusteeships and corporate directorships, and such financial information as the employing agency determines is relevant to the employee's duties. SGE's who are compensated at or above the rate for a GS-16 must file the more elaborate public financial disclosure forms required for high level officials by the Ethics in Government Act. It is important to note, however, that these disclosure requirements are in addition to and not in lieu of the criminal provisions. If a conflict of interest exists, section 208 places the burden on the employee and not the agency to detect it and either to seek a waiver or to recuse himself.

Status of Advisory Committee Members

The provisions of 18 U.S.C. Chapter 11 and the financial disclosure requirements of Executive Order 11222 are applicable to special Government employees. Some, but not all, members of advisory committees are SGE's, and this problem of classification underlies the anomalies and irrationalities in this area.

The distinctions among advisory committee members were not created by the FACA. They stem from Federal personnel law and have been recognized since at least 1962. They are discussed at considerable length in a 1982 memorandum from J. Jackson Walter, then head of the Office of Government Ethics, which is the principal guidance to the agencies on the classification problem. Briefly stated, the applicable rule is that advisors who are selected in their individual capacities are SGE's whereas those who are selected to participate "in a representative capacity to speak for firms or an industry, *** or for any other recognizable group of persons, including, on occasion, the public at large" are treated as representatives, expected to speak for their constituencies and, consequently, not Government employees. There are several additional categories of members of advisory committees. Some are viewed as independent contractors. The distinction between employees and independent contractors is, of course, based on common law principles, and turns primarily on the degree of control by the employer. Finally, some committee members, however they might otherwise be viewed in terms of the SGE/representative distinction, are not SGE's because they have not been "appointed in the civil service" within the meaning of 5 U.S.C. §§2104 and 2105. In this category would be members of privately established "utilized" committees, and members of informally assembled borderline committees whether or not chartered under FACA, where the procedures followed do not amount to an "appointment."

However, there are only two distinctions here that really matter. If a committee member is an SGE he is subject to the conflict-of-interest statute, the financial disclosure requirements, as well as a number of other statutes, including the Hatch Act. If he is not an SGE, for whatever reason, he is subject to none of that.

The Federal Advisory Committee Act covers a very broad range of situations and relationships, and it is not surprising that in dealing with conflict-of-interest questions, distinctions must be made. There are, however, two points which must strike an observer:

(1) The operative distinctions seem primarily conclusory and almost invariably questions of degree. Take, for example, the distinction--crucial for purposes of conflict-of-interest coverage--between a member selected as an individual and one selected as a representative. There are undoubtedly situations in which an agency is primarily interested in ascertaining the views of the industry or other interest group from which the member is selected. Some statutes establishing advisory committees even specify the representative character of the membership. But agencies can generally obtain industry views on an issue without establishing an advisory committee. One would assume that in many situations what the agency is looking for is just the kind of borderline or hybrid situation the conflict-of-interest laws appear to rule out, that is to say, the honest judgment of someone who is forced to weigh his perception of the common good against the narrower interests or biases of the constituency from which he is selected. One might well ask, if what is desired from the member is a mere expression of the industry view, why have him work on a committee? Of course, the

agency can resolve the problems on the legal level simply by classifying the members as representatives while hoping that in practice they can rise above mere representation. In fact there is good reason to believe that is exactly what is happening. But it does seem to me, at least, that the either/or classification called for by the Federal Personnel Manual and the Walter Memorandum oversimplifies what is likely to be a spectrum of situations and a mix of motives on the part of all the participants.

One result of the difficulty in classifying advisory committee members is that the question of compensation -- the only "hard" indicium -- tends to become determinative. An uncompensated adviser _may_ be an SGE, but a compensated adviser _must_ be an SGE. The Federal Personnel Manual states flatly that "{a} person who receives pay from the Government for his services as an adviser or consultant is its employee and not a representative of an outside group." Therefore, if an agency desires to compensate a committee member, he must be treated as an SGE, even if his role on the committee is to "balance" the views of members serving as representatives of special interests.

While the question of compensation should doubtless be relevant in determining whether an adviser should be considered an SGE, I doubt that the flat rule is desirable. Presumably the agency benefits from advice received from persons acting in a representative role or capacity. Why should the agency be forbidden to pay them to do so?

After all, it is not the fact of payment which creates the conflict of interest, but rather the existence of a conflict which is assumed to make payment inappropriate. In the case of representatives deliberately chosen as such, this assumption seems of doubtful validity.

(2) But aside from the difficulties of applying these distinctions, there is the troubling question whether they make any sense in terms of the problem of conflicts of interest. At least with respect to committees rendering policy advice, neither SGE's nor non-SGE's are expected to bring to the deliberations total objectivity. That is why FACA so rightly insists upon balance in committee membership. Conversely, classifying a member of a committee as a representative (or as an independent contractor) does not eliminate the danger of self-serving advice or alleviate the need for an alternative mechanism such as disclosure.

Availability of Waivers

While the distinctions in classifications seem confusing and arbitrary, the waiver authority in 18 U.S.C. §208 does offer an avenue of relief, and it is used, at least in some agencies. However, there appear to be a number of drawbacks:

a) Some agencies, notably the Department of Defense, are extremely reluctant to issue section 208 waivers. This policy may increase the pressure on those officials responsible for establishing advisory committees to find ways to avoid classifying their members as SGE's.

b) Doubts have been expressed whether a section 208(b) waiver may be granted where the financial interest in question is not insubstantial in an absolute sense, even though the agency concludes that any bias arising from that interest may be offset through committee balance or, perhaps, discounted as a result of disclosure. Because of these doubts the President's Commission on Federal Ethics Law Reform is recommending an amendment to section 208 expanding the bases for granting exemptions. The administrative interpretation of section 208, as reflected in the Federal Personnel Manual and Office of Legal Counsel opinions, has been to interpret the waiver authority fairly broadly, but the agencies may not be sufficiently aware of their authority in these circumstances.

c) The waiver process is not always smooth. The experience of the AIDS Commission has been brought to your attention. There, the possibility for a conflict and the need for a waiver was perceived only after the committee had held several meetings. Thus, the members were, all unknowingly, exposed to possible criminal liability.

d) Waivers tend to be limited in scope and place the burden on the member to anticipate potential conflicts outside that scope. Let me quote from a sample waiver letter to a committee member:

> "I have determined pursuant to 18 U.S.C. 208(b)(1) that the personal financial interests you have disclosed are not so substantial as to be deemed likely to affect the services you will provide *** when those services are on matters of broad policy or general applicability. On these matters the provisions of 18 U.S.C. 208(a) are waived. This waiver would not extend to matters which may have a direct, predictable and unique effect on your financial interests or the interests of other related and associated persons covered by 18 U.S.C. ***."

If you were that member's lawyer, would you advise him to take the job?

e) Finally, waivers address only the section 208 problem. This is admittedly the most serious one, but there are others, including a minor irritant, the requirements of the Hatch Act, which would apply on any day when the member is performing committee service.

Agency Practices

To learn how the agencies are administering the distinctions laid out in the Walter Memorandum I examined the responses to this Committee's questionnaire from approximately 25 agencies, and I supplemented this with interviews with agency ethics and committee management officials. My preliminary conclusions are summed up in the draft report. Briefly, they are that each agency tends to place all or nearly all its advisory committee members in the same category, either SGE or representative. Thus, the Department of Health and Human Services, the agency with the most committees and over 20% of the total members, reported that all members are routinely appointed as SGE's. On the other hand, the Department of the Interior, with approximately 150 committees, reported that the members of only one committee were considered SGE's; all other committees were made up of representatives. The Department of Education considers its advisory committee members SGE's, while those at Transportation are all representatives. And so on. I found at least two situations where members who should have been classified as SGE's under the guidelines of the Walter Memorandum were classified as representatives, for reasons of administrative convenience. I suspect there are more. Indeed, unless the member is to receive compensation, there seems to be little reason from either the agency's point of view or the member's to classify him as an SGE.

I have summarized for you the draft report I have submitted to the Administrative Conference. The principal conclusion is that the present distinctions among advisory committee members between special Government employees, on the one hand, and representatives and independent contractors, on the other hand, are extremely fine, difficult to administer consistently, and, in any event, can not be justified in terms of protecting the Government from self-interested advice. In practice they result in agencies requiring too little disclosure from the members who are not SGE's, while imposing significant burdens, principally potential criminal liability, on those members who are SGE's.

The report is, of course, subject to revision in the light of additional information and comments. In the meantime, I am working with the Conference's

Special Committee on Ethics in Government to develop recommendations, which we hope will be ready for the consideration of the full Conference at its June plenary session.

Since the Special Committee is in the midst of its work, I am reluctant to offer detailed recommendations here. My proposal, which the Committee is considering, is for a basically uniform disclosure requirement for all advisory committee members, possibly patterned on that at present in effect for SGE's. There is some disagreement within the Committee as to whether such disclosure should be public or confidential, or, possibly, part public and part confidential. With respect to the conflict of interest provisions of title 18, my recommendation is to narrow somewhat their applicability to advisory committees by permitting agencies some leeway in deciding, on the basis of the function of the committee, whether the members need to be classified as SGE's. Thus, for those committees, such as scientific advisory committees, grant review boards, etc., where the agency must be able to rely on the members' objectivity, the members would continue to be classified as SGE's. But members of those committees concerned with matters of general policy would no longer be classified as SGE's. The agency would simply look to the overall makeup of the committee, including the information disclosed as to employment and financial interest, in deciding who should serve and what weight should be given to the recommendations.

Finally, I think we can all agree, at a minimum, that if no changes are made in the coverage of the conflict of interest laws, the agencies must do a better job of advising committee members and proposed committee members of their potential exposure. It is true, and this point must be emphasized, actual prosecutions under section 208 are very few, and I am aware of no case involving an advisory committee member. Still the potential is there, it could lead to embarrassment, if nothing worse, and the Government owes it to these members, many of whom volunteer their services without compensation, at least to warn them of the risks and how they may be avoided. I note that the Committee's bill, S.444, addresses this problem (pp.19 and 22) by making ethics counselling a part of the "drill", so to speak, when any advisory committee is established. This is good. I think I might go further and immunize advisory committee members from liability for any conflict arising out of an interest where that interest was appropriately disclosed and the agency impliedly acquiesced in the member's continued participation. But I am not sure how the Special Committee will react to this idea.

This concludes my prepared statement. I would be glad to try to answer any questions.

DRAFT REPORT

CONFLICT-OF-INTEREST REQUIREMENTS
FOR MEMBERS OF
FEDERAL ADVISORY COMMITTEES

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Washington, D.C.

November 1988

This is a draft report for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the Conference, its committees, or staff.

Conflict-of-Interest Requirements for Members of Federal Advisory Committees

The purpose of this study is to examine the conflict-of-interest requirements applicable to members of Federal advisory committees. Its scope includes not only an analysis of the legal requirements applicable to the various categories of members, but an examination of the practices of agencies in administering and applying these requirements, with a view to evaluating the efficiency and rationality of the present system, and formulating recommendations for improvements.

As the subsequent discussion will demonstrate, there are significant semantic problems involved in any discussion of the applicability of conflict-of-interest requirements to members of "advisory committees." This paper adopts a functional approach and includes within its scope all individuals and groups, other than full-time Federal employees, which perform advisory rather than operational functions for the Executive Branch or for any Federal agency. Even this definition has problems around the edges, but we should be able to refine our distinctions as we proceed.

This paper proceeds from two hypotheses: The first is that the law and practices regarding conflict-of-interest requirements have developed from the interaction of three statutory schemes, the Federal Advisory Committee Act, the conflict-of-interest laws, and the Federal personnel laws, none of which was drafted to deal specifically with conflict-of-interest standards for advisors to the Government, and that as a consequence this body of law contains anomalies and irrationalities which arise from applying classifications and distinctions which, however rational in their original context, have little or nothing to do with the question of what standards ought to be applied to such advisors. The second is that advisory committees perform a variety of roles in their relation to the federal decisionmaking process and that the conflict-of-interest standard to be applied to any committee member or members should take into account the nature of the committee's role and the ability of the decisionmaker to discount or offset possible bias deriving from conflict of interest.

Statutory Framework

Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA), 5 U.S.C. App. §§1-15, was enacted in 1972. It seeks to regulate the establishment, operation and use of advisory committees to the Federal Government. The Act's definition of "advisory committee" is very broad. It has four key elements. The Act covers (1) any committee or similar group, (2) whose members include one or more individuals who are not full-time Federal employees, (3) established or utilized by the President or a Federal agency, (4) in the interest of obtaining advice or recommendations.

The regulatory scheme of the Act covers various aspects of advisory committee operations. The Act is aimed at a variety of real and perceived problems with Government advisory committees, that some did too much and others too little, that there was too little Federal control of their activities, review of their effectiveness, or follow-up on their recommendations, that advisory committees were not fairly balanced in their membership (particularly, in that many were perceived to have an industry bias), and that there was too little public access to their deliberations or to the results of their work.[1] To deal with these problems, the Act provided a range of corrective measures. The Act requires chartering and periodic review of committees, it attempts to ensure greater responsibility in each agency for the operation of the committees which the agency establishes, it requires greater openness for advisory committees, through provision for publicly noticed and open meetings and publicly available minutes. Conflict-of-interest problems were not a principal focus of the Act. However, there was very definitely a suspicion that advisory committees, particularly in areas involving Federal regulatory programs, had an undue industry bias, and, consequently, one of the key provisions of the Act was to require that authorities establishing advisory committees should "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed," and "assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment." [emphasis added]. 5 U.S.C. App. §5(b),(c).

The coverage of the Federal Advisory Committee Act is very broad. While the term "advisory committee" was familiar in a general way, the classification did not previously carry particular legal consequences, and there was no body of law to which one could advert to determine what was or was not an advisory committee. The Act was designed to regulate agency practices and eliminate agency abuses in the establishment and use of advisory committees, and, therefore, Congress was unwilling to leave it to the agencies themselves to say what they would treat as a covered committee. Consequently, the statutory definitions were designed to prevent evasion, and from the start they created confusion and controversy.

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[1] See, e.g., S. Rept. No. 92-1098, 92d Cong., 2d Sess. 3-4, Federal Advisory Committee Act Sourcebook, 155-56.

The principal areas of confusion over coverage were (1) the so-called ad hoc committees or groups, without formal organization, structure, or continuing existence, brought together to discuss problems with or present views to agency officials; and (2) privately established groups whose views were "utilized" by agency officials in the course of their decisionmaking.

Initial confusion over the status of ad hoc groups and "utilized" committees was increased by early judicial rulings giving a broad interpretation to the statutory definition and by the failure of the agencies charged with providing guidance under the Act to do so.

Finally, in response to a 1980 recommendation of the Administrative Conference of the U.S.,[2] the General Services Administration in its 1983 guidelines attempted to narrow the coverage of the definition. To deal with the problem of the ad hoc groups, the GSA regulation excludes meetings with Government officials "for the purpose of exchanging facts or information," meetings initiated by the group for the purpose of presenting its views to an official or agency where the official does not use the group as "a preferred source of advice," and meetings initiated by a Federal official with more than one individual, where the official is seeking individual and not consensus advice on recommendations. To deal with the problem of "utilized" committees, GSA adopted the view of the ACUS recommendation that a privately established committee is not "utilized" within the meaning of the Act unless the agency through institutional arrangements "adopts [the committee] as a preferred source of advice." 41 CFR §§101-6.1003, 6.1004.

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[2] Recommendation 80-3, 1 CFR §305.80-3.

The definitions in the GSA 1983 guidelines have provoked little controversy and have been useful in excluding from the scope of the Act the ordinary informal give-and-take between Government decisionmakers and the private sector. Yet they assuredly do not eliminate all problems of coverage. Indeed, the guidelines introduce new bases of distinction which in operation are likely to prove somewhat nebulous. What exactly is a "preferred source of advice?" Is there a real distinction between "obtaining the advice of individual attendees" and seeking "to obtain consensus advice or recommendations?"[3/]

Underlying these largely semantic questions is a basic policy question. Is FACA to be viewed as limited to those advisory committees which might be termed "official" or "quasi-official" in that they are organized by or receive financial and/or logistical support from the Government? Or is FACA to be viewed as a more ambitious undertaking, as basically a requirement governing substantially all situations in which the Government actively seeks advice from the private sector? Some aspects of FACA point in each direction. The provisions on committee charters, periodic review, etc., make sense only as applied to those committees which are, realistically, a part of Government. The requirements with respect to openness and membership balance seem to speak more broadly to the entire process by which Government receives outside advice. So long as this dualism remains, questions of coverage are likely to persist.

[3/] See NRDC v. Herrington, 637 F.Supp. 116 (D.D.C. 1986) holding that members of a scientific panel brought together to advise the Department of Energy in an examination of the safety of DOE's Hanford, Wash. plutonium reactor were not an advisory committee because they were being asked to provide individual views and not to act as a committee. The Court indicated that it was not disposed to interpret FACA broadly in situations which do not raise the problems that Congress was concerned about when it enacted FACA.

One noteworthy fact about FACA and its administration is that the Act purports to apply equally to all covered advisory committees regardless of their function.[4] Obviously, advisory committees are established and employed for many different purposes: to tap a source of expertise not available within the Government, to secure the views of interest groups affected by Government policy, to provide an objective critique of a Government program or activity, to develop a broad consensus on a delicate or controversial issue, and even to provide an excuse for inaction.

Various attempts have been made to break the committees down into rough functional categories. Prof. Cardozo listed five functional categories: policy advice, technical advice, fact-finding, evaluation of proposals and applications, and advice in personnel selection.[5] Wegman cites four categories: peer or grant review committees, technical or program review committees, special fact-finding or investigative committees, and general policy advisory committees.[6] The Annual Report of the President on Federal Advisory Committees for Fiscal Year 1987, prepared by GSA's Committee Management Secretariat, lists six functional groups for committees:

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[4] However, judicial decisions suggest that only parts of the Act may be applicable to "utilized" committees, see, Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978); Washington Legal Foundation v. American Bar Association, 648 F.Supp. 1353, 1360-61 (D.D.C. 1986).

[5] Cardozo, The Federal Advisory Committee Act in Operation, 33 Ad.L.Rev. ____ (1981), 1980 ACUS 313, 343.

[6] Wegman, The Utilization and Management of Federal Advisory Committees (1983) pp. 29-31. If we lump Prof. Cardozo's last two categories, which are in some respects similar, his classifications and Wegman's are essentially the same.

scientific/technical program, non-scientific program, grant review, major national policy/issue, regulatory negotiation, and "other".[7]

While these categorizations are helpful in describing what it is advisory committees do, they cannot weigh precisely the relative significance of committees' recommendations to the decisionmaking process. It seems likely, however, that the most influential committees, i.e. those whose recommendations correlate most closely with the final governmental action, would be the grant review committees and those committees which provide a technical expertise which the Government does not have in-house. Conversely, on matters of broad policy the governmental decisionmaking authority, whether an agency, the President or Congress, is less likely to defer to the committee judgment, and the committee's influence is likely to depend on the persuasiveness of its report, the political acceptability of its proposals, and a variety of other considerations. Obviously, the greater the committee's influence on the decisionmaking process, the more important it becomes to prevent conflicts of interest.

For purposes of this paper, the point to be emphasized is that FACA, and particularly FACA in its broader reading, embraces committees and similar groups with a great variety of functions, organizational structures and ties, relationships and obligations to the Federal Government. Indeed, perhaps the only element common to all covered advisory committees is that in some way and for some reason they are looked to by the Federal decisionmaker as "a preferred source of advice."

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[7] Sixteenth Annual Report of the President on Federal Advisory Committees, p. 2. The breakdown is based on the sponsoring agency's categorization. The regulatory negotiation category accounted for less than 1% of the total.

Conflict-of-Interest Requirements

FACA, as we have seen, prescribes no conflict-of-interest requirements for advisory committee members. Indeed, it might be argued that it adopts an alternative approach for obtaining objective advice. FACA's requirement that committees be "fairly balanced in terms of the points of view represented," is tacit recognition that members are not expected to approach their agenda with Olympian detachment, although the very next statutory injunction, "that the advice and recommendations * * * will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment," certainly asks the members to walk a very thin line.

At any rate FACA was not enacted in a vacuum, and it may be assumed that the drafters were aware of the general framework of legal requirements governing conflicts of interest of advisory committee members. The most significant of those requirements are those imposed by 18 U.S. Code Chapter 11, entitled "Bribery, Graft, and Conflicts of Interest."

18 U.S.C. Ch. 11 is applicable to Federal employees generally, and many of its provisions go back to the nineteenth century. However, the statutes were thoroughly revised in 1962 by Public Law 87-849. One of the principal contributions of P.L. 87-849 was to distinguish for purposes of conflict-of-interest requirements between full-time Federal employees and "those who serve the Government intermittently or for a short period of time," and to except persons in the latter category from certain of the prohibitions imposed on ordinary full-time employees.

To this end P.L. 87-849 created the category of "special Government employee" (hereinafter SGE), defined as "an officer or employee * * * who is retained, designated, appointed or employed to perform, with or without compensation, * * * temporary duties either on a full-time or intermittent basis" for not to exceed 130 days in any 365-day period, 18 U.S.C. §202(a).

The various prohibitions of 18 U.S.C. Ch. 11 are complicated, but may be described generally as follows:

18 U.S.C. §201 prohibits bribery of public officials and witnesses in Federal proceedings. It punishes both the giving and the receiving of bribes. The term "public official" includes any person "acting for or on behalf of the United States * * * in any official function." The term has been interpreted broadly, see Dixson v. United States, 465 U.S. 482 (1984),[8/] and probably would include members of Federal advisory committees who are SGE's and arguably even those who are independent contractors. It is unlikely that this provision would cover one who is advising as a representative of an outside group.

18 U.S.C. §§203 and 205 deal with representation of a private party by a Government employee in a judicial or administrative matter in which the United States is a party or has a direct or substantial interest. A regular Government employee may not represent another person before an agency or a court in such a proceeding, with or without compensation. An SGE is subject to much more limited prohibitions. (1) He may not represent anyone else before a court or agency in a matter in which the United States is a party or has a direct and substantial interest where the matter involves a specific party or parties and where he has at any time participated personally and substantially in the same matter in the course of his Government employment. (2) If the SGE has served in his agency more than 60 days in the past 365 days he may not

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[8/] In Dixson the Court held, 5-4, that officers of a private non-profit corporation administering community development grants as the designee of a local governmental grantee were "public officials" under section 201.

represent anyone in a matter before that agency involving a specific party or parties. (It should be noted that in conflict-of-interest parlance, particular matter involving a specific party or parties is a relatively narrow concept and does not include a rulemaking of general applicability.)[9]

18 U.S.C. §207 deals primarily with post-employment restrictions. With respect to both regular and special Government employees, section 207(a) imposes a permanent ban on representation in connection with a particular matter involving a specific party or parties, where the employee participated personally and substantially in the decisional process in the course of his Government service. Section 207(b) imposes a two-year ban on representation with respect to a particular matter involving a specific party or parties when the matter was actually pending under the former employee's official responsibility within one year prior to his leaving Government. It also imposes a two-year ban on certain kinds of assistance in representation by so-called Senior Employees with respect to particular matters involving specific parties in which they participated personally and substantially while in Government employment. Section 207(b) does not exclude SGE's from its operation, but it is unlikely to impact very frequently on SGE's because they are rarely Senior Employees and do not usually have such particular matters pending under their official responsibility.

Section 207(c) applies exclusively to Senior Employees, including SGE's who serve for more than 60 days in a calendar year, and forbids for one year after employment with the agency has ceased any representational activity before that agency irrespective of the subject matter.

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[9] There is considerable overlap between sections 203 and 205. According to the explanatory memorandum of the Department of Justice, "for all practical purposes Section 205 completely overshadows Section 203 in respect of officers and employees of the Government." Section 203, however, also covers Members of Congress.

Section 207(h) is the only provision in section 207 not addressed to post-employment activities. It prohibits a partner of a Government employee from acting as agent or attorney before any agency or court with respect to any particular matter (not qualified by "involving a specific party or parties") in which the employee has participated personally and substantially. This provision is specifically applicable to SGE's. Because the "particular matters" to which it applies need not involve specific parties, section 207(h) has the anomalous effect of prohibiting representation by a partner of an SGE in circumstances in which the SGE himself would not be barred by section 203(b) or section 205(b).

18 U.S.C. §208 is the most important conflict-of-interest provision for purposes of our inquiry. Section 208 prohibits a Government employee, including an SGE, from participating "personally and substantially" as a Government employee "through decision, * * * recommendation, the rendering of advice, investigation, or otherwise, in * * * [any] particular matter in which to his knowledge, he, his spouse, minor child, partner, organization * * * has a financial interest." This is an especially broad prohibition in several respects. "Particular matter" is not qualified by the words "involving a specific party or parties" and has been interpreted very broadly by the Department of Justice.10/ It does include adoption of rules of general

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10/ In a 1978 opinion the Office of Legal Counsel, Department of Justice stated, "[W]e have consistently interpreted §208(a) to apply to rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a 'direct and predictable effect' on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner," 2 Ops. OLC 151, 155 (1978).

applicability. Second, the participation which is forbidden includes the rendering of advice. Third, the range of financial interests it reaches is broad, and there is within the statute itself no de minimis exception. However, because of its very breadth the statute itself recognizes a need for exceptions. Accordingly, section 208(b) provides for waivers by the employing agency (1) in particular cases where the employee discloses to the appointing official the conflicting financial interest and the appointing official makes a written determination that "the interest is not so substantial as to be deemed likely to affect the integrity of the services" of the employee, and (2) where the agency by general rule exempts certain financial interests as "too remote or too inconsequential to affect the integrity" of employees' services.

18 U.S.C. §209, which forbids a Government employee to receive any salary or supplement as compensation for his services to the Government, is specifically made inapplicable to SGE's.

If we consider the potential impact of 18 U.S.C. §§201-09 on SGE's who are advisory committee members, it is evident that the principal trouble spot is section 208. Section 201 is broad in coverage, but hardly a trap for the unwary. The prohibitions in sections 203 and 205 are narrow, of principal interest to lawyers, and no more than common sense and the Canons of Ethics would require.11/ The revolving door provision of section 207(a) is likewise narrow and reasonable, and the broader prohibitions of sections 207(b) and (c)

11/ Sections 203 and 205 do apply to any kind of representation, not merely representation as an attorney. For example, one who negotiates a contract with the Government on behalf of a corporation acts as an agent within the meaning of section 205. However, section 205 states that neither that section nor section 203 prevents an SGE from acting as agent or attorney for another in the performance of work under a Government grant or contract where the head of the department or agency certifies that the national interest so requires.

are not likely to apply to many advisory committee members.[12] Section 207(g), the prohibition on representational activity by a partner of an employee, is worth special attention because it may come into play in unforeseen and rather innocent circumstances, particularly where an advisory committee member is a member of a large law firm. However, section 207(g) applies primarily to lawyers in private practice, and a relatively small number of committee members are lawyers.[13]

Section 208, on the other hand, is very broad, as I have pointed out. Since it covers rulemaking of general applicability, as well as substantially any other kind of agency action, an SGE who serves on an advisory committee which is making a recommendation respecting a rule that would affect the industry to which he has financial or employment ties would be bound to recuse himself unless he received a waiver from the agency under section 208(b).

The Federal Personnel Manual recognizes this problem and encourages the use of waivers where "the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization." FPM, p. 735-C-4. The Office of Legal Counsel has observed that this provision of the Manual constitutes a "gloss" on the statutory language of section 208(b)(1) that "the interest 'is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect' from the special Government employee" and seems particularly geared to "members of advisory committees, who are often specifically chosen because of an expertise that results from this affiliation with particular organizations, firms, or groups having a general interest in the very matters before the advisory committee." However, OLC emphasized that the exemption process "compels the responsible Agency official to focus on the questions of the special Government employee's outside affiliations and to make a specific written finding with respect to the expected integrity of the individual's services.[14]

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[12] The Post-Employment Restrictions Act, which was passed in the closing days of the 100th Congress and is at this writing awaiting Presidential approval, would make substantial revisions in section 207, but the bill appears to have only limited impact on SGE's. The most significant change for SGE's is that section 207(a)'s permanent ban on representing a party other than the Government in a matter involving specific parties in which the former employee participated personally and substantially while in the Government, will be expanded to include advice concerning an appearance before an agency or court as well as the appearance itself. This should not have much significance for lawyers, since the Canons of Ethics prohibit both advice and appearance under such circumstances, but it might have some impact for nonlawyers. The more significant changes in section 207, however, involve expanding the breadth of the present one-year ban on communications with one's former agency, and these broader prohibitions apply only to Executive Level employees, White House staff, and other top level officials. (Analogous prohibitions are placed on post-employment lobbying by Congressmen and Congressional staff.)

[13] According to the Sixteenth Annual Report of the President on Federal Advisory Committees, only 698 (3.5%) of the nearly 20,000 members of advisory committees are lawyers.

Disclosure Requirements. In addition to the criminal prohibitions of 18 U.S.C. Ch. 11, SGE's are subject to certain financial disclosure provisions. Under Executive Order 11222 of May 8, 1965 and OPM regulations, 5 CFR §735.412, SGE's are required to file with the employing agency a confidential statement of other employment, including corporate directorships, trusteeships and similar affiliations, and such financial information as the appointing agency determines is relevant to the SGE's duties. SGE's who are paid at the rate of a GS-16 or higher also must file the more elaborate public financial disclosure form (SF-278) required of high level Government officials by Title II of the Ethics in Government Act.

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[14] 2 Ops. OLC 151, 156-57 (1978). If the Manual provision in question is read as exclusively applicable to section 208(b)(1), it would follow that waivers in such circumstances could be granted *ad hoc* but not by general rule. The Nuclear Regulatory Commission has stated that it is its policy to grant waivers to SGE's in the circumstances described, but such waivers must nevertheless be granted individually. 10 CFR §0.735-21(d).

The Office of Government Ethics is at present revising the regulations governing the system of confidential financial reporting by Federal employees, including SGE's. The proposed regulations published December 2, 1986, would have expanded the reporting requirements for SGE's well beyond what has been generally required under Executive Order 11222, but because of provisions permitting agencies with OGE approval to "tailor" reporting requirements to their needs by asking for either more or less information and to exempt some individuals entirely, it is hard to gauge the impact precisely. The proposed regulation has met with considerable criticism, and one may anticipate significant changes in the final version.[15]

The applicability of the provisions of 18 U.S.C. Ch. 11, as well as the financial disclosure requirements cited above, to SGE's depends exclusively on the SGE's employment status and not (except for the "responsibility" provision in section 207(b)) on the nature of their functions. In other words, these conflict-of-interest statutes do not distinguish between operational and advisory responsibilities. Nevertheless, Congress was well aware that SGE's frequently serve in advisory roles, and indeed the principal purpose of creating the category of SGE's was to ease the recruitment of experts and consultants whose main work was performed outside of Government.

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[15] The proposed regulation, 51 F.R. 43359-65, would require covered employees, including SGE's, to report the source and nature (but, apparently, not the amount) of any investment income, and a description (but, apparently, not the value) of other assets held for production of income, the source of any earned income, and information respecting employment or affiliations with profit or non-profit organizations. Agencies would, however, have authority to exclude individuals from "all or a portion of the reporting requirements" on the basis of appropriate findings by the agency head. The regulations would exclude from coverage individuals "performing services for the United States as an independent contractor under a personal service contract."

Status of Advisory Committee Members

As we have seen, the category of special Government employee was established to deal with the conflict-of-interest problems arising from the situation of part-time or intermittent Government employees, serving with or without compensation, frequently in advisory roles. But because some part-time advisors are to be treated as SGE's, it does not follow that all must be. The variety of advisory relationships between persons in the private sector and decisionmakers in the Federal Government has been the source of some confusion.

The principal guidance to the agencies on the subject of the status of members of Federal advisory committees for purposes of the conflict-of-interest laws is a memorandum dated July 9, 1982 from the then Director of the Office of Government Ethics, J. Jackson Walter, to the heads of all Executive departments and agencies.[16] This memorandum reviewed at length the administrative practice in dealing with part-time Government advisors since shortly before the enactment of P.L. 87-849. The principal distinction which the Walter Memorandum pointed to was that between those advisory personnel who are selected because of their individual qualifications and those who are expected to act in a representative capacity for an industry, for labor or agriculture or some other group. This distinction, first enunciated in a memorandum from President Kennedy dated February 9, 1962 and entitled "Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government," has been maintained with revisions to take into account the provisions of P.L. 87-849, in the regulations of the Office of Personnel Management, Federal Personnel Manual, Part 735, Appendix C. The pertinent portion of Appendix C is worth quoting at length because, together with the Walter Memorandum, it remains the principal operative guidance to the agencies.

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[16] As the memorandum points out, "There is no substantive difference between an appointee providing advisory service individually and one doing so as a member of a committee." Walter Memorandum, p.2.

> "It is necessary occasionally to distinguish between consultants and advisers who are special Government employees and persons who are invited to appear at an agency in a representative capacity to speak for firms or an industry, or for labor or agriculture, or for any other recognizable group of persons, including, on occasion, the public at large. A consultant or adviser whose advice is obtained by an agency from time to time because of his individual qualifications and who serves in an independent capacity is an officer or employee of the Government. On the other hand, one who is requested to appear before a Government agency to present the views of a nongovernmental organization or group which he represents, or for which he is in a position to speak, does not act as a servant of the Government and is not its officer or employee. He is therefore not subject to the conflict of interest laws and is not within the scope of this chapter.
>
> The following principles are useful in arriving at a determination whether a person is acting before an agency in a representative capacity:
>
> (1) A person who receives pay from the Government for his services as an adviser or consultant is its employee and not a representative of an outside group. The Government's payment of travel expenses and a per diem allowance, however, does not by itself make the recipient an employee.
>
> (2) It is rare that a consultant or adviser who serves alone is acting in a representative capacity. Those who have representative roles are for the most part persons serving as members of an advisory committee or similar body utilized by a Government agency. It does not follow, however, that the members of every such body are acting as representatives and are therefore outside the range of the conflict of interest laws. This result is limited to the members of committees utilized to obtain the views of nongovernmental groups or organizations.
>
> (3) The fact that a person is appointed by an agency to an advisory committee upon the recommendation of an outside group or organization tends to support the conclusion that he has a representative function.

> (4) Although members of a governmental advisory body who are expected to bind outside organizations are no doubt serving in a representative capacity, the absence of authority to bind outside groups does not require the conclusion that the members are Government employees. What is important is whether they function as spokesmen for non-governmental groups or organizations and not whether they can formally commit them.
>
> (5) When an adviser or consultant is in a position to act as a spokesman for the United States or a Government agency--as, for example, in an international conference--he is obviously acting as an officer or employee of the Government."

The Walter Memorandum recognizes, however, that the distinction set out in Appendix C between SGE's and private sector representatives does not exhaust the possibilities for classifying those who furnish advice to the Government. Advisory services may also be furnished through a contract, and in that case the advisor or advisors may be independent contractors.

One of the key indicia of the employment relation in the Government, as elsewhere, is that an employee must carry out his duties under the supervision of another employee. An independent contractor, the Walter Memorandum points out, "is not hired under the civil service laws and is not subject to the supervision that inheres in an employee-supervisor relationship in the civil service. More to the point, he is not an employee for the purposes of 18 U.S.C. §§202-09."

The Memorandum observes that the employee/independent contractor distinction is not often a problem because "committees are rarely brought into the service of an agency by means of a contract." But if the problem were to come up, the issue would be resolved under the ordinary legal principles which govern the distinction between employees and independent contractors.

> "However, it is worthwhile to mention an issue that could arise in connection with the conflict-of-interest statutes if an agency were to create an advisory committee and then enter into a contract with it or each of its members individually. The issue is whether the agency would in practice exercise supervision over the operations of the committee and the formulation of judgments by its members that was great enough to taint the contract as a device for concealing their true status as SGE's under §§202-209. If an agency, for example, were to convene a committee and award the members a contract pursuant to which they (1) produced, after independent study, an advisory paper dealing with a problem that the agency's staff was too busy to resolve on its own and (2) delivered the paper without antecedent clearance from the staff or agency head, the committee members would properly have been deemed contractors. However, if the committee worked routinely subject to the scrutiny of the staff and with a significant amount of guidance from it, the members would be open to the charge that they actually served as SGE's and were subject to §§202-209. As appears from these examples, the question is one of degree."

Still another distinction discussed in the Memorandum is the circumstance in which a Federal official receives "unsolicited, informal advice from an outside individual or group of individuals regarding a particular matter or issue of policy that is within his official responsibility. Or he may himself bring up an agency matter of policy issue informally with one or more outsiders in order to obtain their views. An incident of this sort sometimes prompts the inquiry whether the outsiders have become SGE's of the agency. In general, the answer is that they have not, for they are not possessed of appointments as employees nor do they perform a federal function." However, Mr. Walter felt compelled to subject this conclusion to a caveat:

> "An official should not hold informal meetings more or less regularly with a non-federal individual or group of individuals for the purpose of obtaining information or advice for the conduct of his office. If he does so, he may invite the argument that willy-nilly he has brought

> them within the range of 18 U.S.C. §§202-09." [emphasis added].

This portion of the Memorandum seems a departure from what is otherwise a very tightly reasoned discussion. It seems very doubtful that the mere frequency of meetings of one or more Federal officials with a group of individuals can "willy-nilly"[17] and contrary to the intentions of all concerned bring those individuals into an employment relation with the Government so as to subject them to the criminal sanctions of 18 U.S.C.§§202-09.

What we have here is basically the problem of the ad hoc advisory committee. But if we assume that at some point the informal ad hoc committee shades over into a committee covered by the FACA, does it necessarily follow that at the same point on the spectrum the committee members become SGE's? And if at that point the Federal official should comply with FACA and formalize these informal arrangements, are these committee members SGE's if he fails to do so?

The Walter Memorandum does not address still another problem raised by FACA, the members of "utilized" committees. The reason is doubtless that these committee members are assumed not to be subject to the conflict-of-interest laws because, by hypothesis, they have not been selected and, therefore, not appointed by a Federal official.

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[17] The term is well chosen for it comes from the Latin volens/nolens, willing or not willing. The notion of an advisor becoming a Federal employee "willy-nilly" has given the Department of Justice pause. "In the usual case [the employment] relationship is based on an identifiable act of appointment. However, an identifiable act of appointment may not be absolutely essential * * * in a particular case where the parties omitted it for the purpose of avoiding the application of the conflict-of-interest laws or perhaps where there was a firm mutual understanding that a relatively formal relationship existed." 1 Ops. OLC 20, 21 (1977).

To sum up, in theory there appear to be at least five categories of members of Federal advisory committees in terms of conflict-of-interest law analysis (excluding regular Government employees serving in their official capacities):

1. Members selected by a Federal official to serve on a formally established advisory committee in their individual capacities with or without compensation.

2. Members selected to serve in a representative capacity, as described in Part 735, Appendix C of the Federal Personnel Manual.

3. Independent contractors who have been engaged by the Government to supply advice or recommendations pursuant to a contract and whose work is not supervised or controlled by a Federal employee.[18]

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[18] There is some question whether a committee which performs consultant services for the Government under a contract is an advisory committee under FACA. See Lombardo v. Handler, 397 F.Supp. 792, 797-800 (D.D.C. 1975) aff'd without op., 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977), citing legislative history to the effect that FACA "does not apply to persons or organizations which have contractual relationships with the Federal agencies nor to advisory committees not directly established by or for such agencies." 397 F.Supp. at 799, citing 118 Cong. Rec. 31421. On the other hand, Paul Weiss, GSA's Associate Administrator for Administration, recently stated in responding to a Congressional question regarding the applicability of FACA to advisory committees created in connection with the performance of Federal contracts: "[T]he test for inclusion under the Act is that the agency's contract requires that the advice of a group or other than contractor personnel be provided to the agency, and that the contractor has not merely solicited advice as part of the activities incidental to the performance of the contract." Hearing before the Senate Committee on Governmental Affairs, Department of Defense/Strategic Defense Initiative Organization Compliance with Federal Advisory Committee Act (4-19-88).

Agency responses to Senator Glenn's questionnaire, see text at note 22, infra, classified a few committee members as independent contractors.

4. Members of an informal ad hoc group whose advisory activities have crossed the FACA threshold but who have not met the requirements of 5 U.S.C. §2104 and §2105 for appointment in the Federal service.

5. Members of committees which are privately established but which are "utilized" by the Government as "a preferred source of advice."

The first category of advisory committee members are SGE's and are subject to the conflict-of-interest laws. All the other categories of members are not SGE's and are not subject to the conflict-of-interest laws.

This multiplicity of categories is in itself neither good nor bad. Most subjects in Government are complicated. The Federal Advisory Committee Act covers a very broad range of situations and relationships, and it is not surprising that in dealing with conflict-of-interest questions, distinctions must be made.

There are, however, two points which must strike an observer:

(1) The operative distinctions seem primarily conclusory and almost invariably questions of degree. Take, for example, the distinction--crucial for purposes of conflict-of-interest coverage--between a member selected as an individual and one selected as a representative. There are undoubtedly situations in which an agency is primarily interested in ascertaining the views of the industry or other interest group from which the member is selected. Some statutes establishing advisory committees even specify the representative character of the membership. But agencies can generally obtain industry views on an issue without establishing an advisory committee. One would assume that in many situations what the agency is looking for is just the kind of borderline or hybrid situation the conflict-of-interest laws appear to rule out, that is to say, the honest judgment of someone who is forced to weigh his perception

of the common good against the narrower interests or biases of the constituency from which he is selected.[19] Of course, the agency can resolve the problem on the legal level simply by classifying the members as representatives while hoping that in practice they can rise above mere representation. But it does seem to me, at least, that the either/or classification called for by Appendix C and the Walter Memorandum oversimplifies what is likely to be a spectrum of situations and a mix of motives on the part of all the participants.

One result of the difficulty in classifying advisory committee members is that the question of compensation--the only "hard" indicium--tends to become determinative. An uncompensated adviser may be an SGE, but a compensated adviser must be an SGE. Appendix C states flatly that "[a] person who receives pay from the Government for his services as an adviser or consultant is its employee and not a representative of an outside group." Therefore, if an agency desires to compensate a committee member, he must be treated as an SGE, even if his role on the committee is to "balance" the views of members serving as representatives of special interests.

While the question of compensation should doubtless be relevant in determining whether an adviser should be considered an SGE, I doubt that the flat rule stated in Appendix C is desirable or realistic. Presumably the agency benefits from advice received from persons acting in a representative role or capacity. Why should the agency be forbidden to pay them to do so? In other contexts such payments are allowed, as when an agency provides financial support for public interest representation in its proceedings. Indeed, when Congress has turned its attention to the problem in the course of establishing statutory advisory committees, it has on occasion provided for compensation for committee members who serve as representatives of outside interests.[20] After all, it is not the fact of payment which creates the conflict of interest, but rather the existence of a conflict which is assumed to make payment inappropriate. In the case of representatives deliberately chosen as such, this assumption seems of doubtful validity.

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[19] One might well ask, if what is desired from the member is a mere expression of the industry view, why have him work on a committee? The committee device implies an interest in developing a consensus through exchange of views, which in turn implies that the individual's own views are of interest to the agency. Of course, it may well be that the function of the committee is not so much to communicate the constituencies' views to the agency as to make the agency's actions more palatable to the constituencies.

Even more nebulous in this context is the distinction between the SGE and the independent contractor. If the key issue is supervision and control, the requirement of FACA that recommendations of the advisory committees "not be inappropriately influenced by the appointing authority * * * but will instead be the result of the advisory committee's independent judgment" seems inconsistent with the conclusion that committee members are SGE's.

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[20] The legislation establishing the Technical Pipeline Safety Standards Committee, 49 U.S.C. App. §1673, and the Technical Hazardous-Liquid Pipeline Safety Standards Committee, 49 U.S.C. App. §2003, specifically provides compensation for the non-Federal members of the committees, and that such payments "shall not render members of the Committee employees or officials of the United States for any purpose." The Department of Transportation treats these members as representatives. The statute establishing the Advisory Council on Employee Welfare and Pension Benefit Plans, 29 U.S.C. §1142, provides that three members "shall be representatives of employee organizations" and three "shall be representatives of employers." It also provides that members shall be entitled to daily pay at the rate of a GS-18. The Department of Labor has felt compelled to classify these members as SGE's notwithstanding their representative role on the committee, and has provided appropriate waivers under section 208. On the other hand, where section 7 of the Occupational Safety and Health Act, 29 U.S.C. §656, authorized, but, in Labor's view, did not compel compensation for advisory committee members serving as representatives, Labor decided not to provide compensation in order to treat the members as representatives and not as SGE's.

(2) But aside from the difficulties of applying these distinctions, there is the troubling question whether they make any sense in terms of the problem of conflicts of interest. Concededly, the distinction between advisory committee members who are selected to exercise independent judgment and those who are selected to represent distinct interests is sound enough in theory whatever its difficulties of application. Distinctions between SGE's and independent contractors in terms of conflict-of-interest requirements make little if any sense. With respect to members of ad hoc or of utilized committees, the distinction can probably be justified by the practical impossibility of bringing the conflict-of-interest laws into play where the relationships to the Government are so tenuous. But that does not eliminate the danger of self-serving advice or obviate the need for some alternative mechanisms.

One of the issues I have researched is how agencies have administered the fine distinctions set forth in the Walter Memorandum. Given the number of agencies and committees involved,[21] it has simply not been feasible to examine on any systematic basis the correctness of the legal conclusions the agencies have reached. However, the information available suggests a tendency of agencies to adopt a policy of administrative convenience and to consider members as interest group representatives, at least in all doubtful cases.

In March, 1988, Chairman Glenn of the Senate Committee on Governmental Affairs sent a letter to the agencies asking twenty questions respecting their management of advisory committees. One question was: "Do you consider members of advisory committees to be regular government employees, special government employees, or independent contractors? What criteria has the agency established to make this determination?" I have examined the responses to this question from 24 agencies and obtained additional information through interviews at a half-dozen agencies. My preliminary conclusions are as follows:

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[21] There were 992 advisory committees and 57 sponsoring agencies in fiscal 1987. Total membership was 19,837 individuals, of whom approximately 8% were full-time Federal employees. There is no breakdown on the status of the remaining membership. Sixteenth Annual Report of the President on Federal Advisory Committees, pp. 1-2, 7, 9.

1. Agencies tend to place (or at least, to report) all or nearly all non-Government members in the same category. Thus, the Department of Health and Human Services, the agency with the most committees and over 20% of the total committee members, reported, "Members of committees which are established to advise the Department are routinely appointed as special government employees." Other agencies which reported that all or nearly all members were SGE's included NASA, the United States Information Agency, and the Nuclear Regulatory Commission. On the other hand, the Department of Transportation, with over 20 committees and over 500 members, reported that all its advisory committee members served as representatives, and the Department of the Interior, with approximately 150 committees and over 1,500 members, reported that the members of only one committee were considered SGE's; all other committees were made up of members serving in a representative capacity. Other agencies reporting that their members were all or mostly representatives included the Department of Energy, the Department of the Treasury, the Office of the United States Trade Representative, the Eximbank, the Federal Home Loan Bank Board, the Federal Mediation and Conciliation Service, and the Small Business Administration.22/ Although many agencies cited the 1982 Walter Memorandum as their principal

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22/ These agency replies expressly or impliedly exclude from consideration committee members who are full-time Federal employees. However, the membership figures cited, which I have drawn from the Sixteenth Annual Report, are total committee membership.

source of guidance, my impression (possibly unfair) is that of the agencies whose responses I reviewed, only the Department of Labor and EPA have attempted to apply the criteria on a case-by-case basis. Four agencies reported that some committee members were serving as independent contractors.

2. In at least two instances, committee members who were clearly SGE's under the Walter Memorandum and FPM guidelines were classified as representatives for reasons of administrative convenience. (Neither instance involved significant potential for conflict of interest.) Several agencies reported as a basis for not treating members as SGE's that they received no compensation for their services, a consideration which should not be controlling under the Walter Memorandum.

3. Agencies, by and large, do not demand financial disclosure from committee members who are not SGE's. The National Endowment for the Humanities classifies its advisory committee members as independent contractors. However, since the committees make recommendations with respect to award of grants, the Endowment reported that it took precautions to avoid appointing panelists to review applications from institutions with which they were affiliated. (The replies are too sketchy to get an adequate idea of agency efforts to brief non-SGE members on conflict problems.)

Problems and Possible Recommendations

The preceding discussion has been primarily a laying-out of the legal framework governing conflicts of interest for advisory committee members. However, a number of problems and recommendations can be stated at least tentatively:

1. The distinctions between the various categories of members of advisory committees--SGE's, independent contractors, representatives--are fine and to a large extent irrelevant to the problems of guarding against conflicts of interest. Furthermore, there is good reason to believe that they are not being administered by the agencies in a uniform manner.

2. The burdens associated with classification as an SGE, in terms of financial disclosure, potential criminal liability, Hatch Act coverage, contrast sharply with the minimal burdens on committee members who serve in any other capacity. Consequently, at least where committee service is not compensated, agencies are likely to avoid classifying members as SGE's.

3. Advisory committees vary greatly in their functions and in the degree to which conflicts of interest must be guarded against. Generally speaking, the need to avoid conflicts is greatest with respect to those committees involved in reviewing grants or similar applications and those furnishing scientific or technical advice, whereas for those committees providing policy advice the avoidance of conflicting personal interests is less important than assurance that the agency is aware of those interests and able to discount them where appropriate or to offset them through committee balance.

Recommendation. There should be a special body of conflict-of-interest rules applicable to persons who serve on advisory committees. The rules should apply irrespective of the status of the committee members, but should consist essentially of a duty to disclose information relevant to potential conflicts of interest. It should be the responsibility of the agency to determine whether there is a conflicting interest which calls for disqualification.

Each agency should designate those advisory committees which it deems an integral part of its decisionmaking process and should apply the disqualification standards of 18 U.S.C. §208 to service on those committees.

4. A subsidiary problem is the uncertainty with respect to the status of committee members for purposes of the conflict-of-interest laws. Although, as a practical matter, it is extremely unlikely that a committee member not formally appointed or designated as an SGE would be criminally prosecuted under 18 U.S.C. §§201-219, the possibility cannot be completely ruled out. Agencies have an obligation to their committee members to inform them of their status and the legal consequences.

Recommendation. If the legal distinctions among various categories of committee members are not eliminated as proposed above, each agency should clearly inform each advisory committee member of his status, and this information should be included in each advisory committee charter. The Government should be bound by this classification in any litigation under 18 U.S.C. §§201-219.

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TESTIMONY OF HENRY M. JASNY
CENTER FOR AUTO SAFETY

BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS
OF THE UNITED STATES SENATE

Regarding S. 444, A Bill to Amend
The Federal Advisory Committee Act

March 15, 1989

On behalf of the Center for Auto Safety, I thank the Committee on Government Affairs for this opportunity to present our views on the proposed revisions to the Federal Advisory Committee Act (FACA). The changes embodied in S. 444 include a number of beneficial amendments that clarify statutory language and that improve the operation of the statute. Yet, the Center has serious reservations concerning the bill's treatment of unchartered or "phantom" committees; its attempt to deal with the question of committee balance; and its approach to ethical standards applicable to advisory committee members, especially procedures governing conflicts of interest and public disclosure requirements. These issues, which are currently the subject of contention under the present law, are not sufficiently resolved by the proposed legislation. The Center's views on these problem areas are addressed in our written statement submitted to the Committee.

I. Exemption of State and Local Officers and Employees

Our paramount concern, however, is the proposal, in Section 4 of the bill, to exempt committees composed of state and local government officials and employees. Although seemingly innocuous and well-intentioned in order to expedite certain federal program activities, the provision is ill-advised since it opens the door to special interest groups which have a considerable stake in the determination of federal policy, rules and regulations. This new exemption represents a serious threat to open government which will permit the return of special interest group influence over federal policy at the expense of the public interest.

State and local officials or employees do not operate in a vacuum. Most such employees are either voluntary members of or, as part of their official functions, are required to participate in private organizations that have interests related to their area of expertise and the operation of their agency. Active membership and participation by employees of state and local governments in special interest groups influences, if not entirely dominates, the views these employees present on behalf of their agencies to federal officials. The state and local government view is often the product of direct influence by an interest group or the indirect result of employee participation in a state or local interest group.

Moreover, the states and localities have institutionally ingrained positions that differ from, and often are opposed to, the intent of federal legislation, regulation and the administration of federal programs. The states and localities, in this regard, are not merely cooperating levels of government but are grantees under many federal programs and also regulated parties subject to federal rules and oversight. As such, they have a significant self-interest in the decisions made by the responsible federal officials. In many areas of public policy, such as Clean Air Act air pollution attainment standards and the

Federal-aid Highway Act, Federal regulation and state interests often conflict, and to permit resolution of those differences at closed-door meetings is inimical to the greater public interest.

The FACA guards against the undue influence of any special interest. The reality is that states and localities, as the recipients of federal grants and as parties subject to federal regulation, possess a special interest viewpoint regarding those programs. States and localities invariably want more federal funds and less stringent federal requirements. In many instances, the FACA works specifically to balance the special interest positions of the states and localities on these issues. To exempt them from the operation of the FACA will create an uneven playing field for the other parties concerned with federal regulatory decisions and runs counter to the open, fair government philosophy of the FACA.

In order to elucidate the danger that this provision poses to fair, open government, I will briefly relate the experience of the Center with the Federal Highway Administration (FHWA), a modal administration of the United States Department of Transportation. The FHWA administers the Federal-aid Highway Act, one of the largest federal grant-in-aid programs, and will disburse $12.7 billion to the states during this fiscal year alone. Each year, the decisions made by FHWA officials directly affect the expenditure of billions of dollars, the health and safety of millions of Americans, the construction and maintenance on a million miles of highways, roads and streets, and the safety inspections of over one-half million bridges in our nation.

Determinations made by FHWA personnel regarding the minimal standards to which the nation's infrastructure will be built, reconstructed or maintained must weigh the costs to the states on the one hand, against the safety of the travelling public on the other. These two concerns are forever in conflict.

In the past, FHWA avoided public participation in agency policymaking by invoking the contracts and grants exemption of the Administrative Procedure Act, 5 U.S.C. 553(a)(2). This permitted the agency to avoid public notice and comment rulemaking regarding federal policy under the Highway Act. In addition to its aversion to public rulemaking, FHWA persistently relied upon the American Association of State Highway and Transportation Officials (AASHTO), in violation of the FACA, as a preferred source for advice and recommendations regarding highway policy.

AASHTO is a private special interest group comprised of the departments of transportation of the fifty states and all state highway department officials and employees. State highway department employees serve on all the committees, sub-committees, and task forces of the organization, and they develop the AASHTO positions on issues which are then adopted by the state agencies and their employees. The position adopted by the interest group is conveyed to the FHWA by AASHTO.

The FHWA-AASHTO relationship has formed a closed system which has opened to scrutiny only through the Center's litigation which applied the FACA to the FHWA-AASHTO relationship, and by changes in the U.S. Department of Transportation's rulemaking regulations, also fostered by Center actions. Although AASHTO claims to represent the states, the Federal Court of Appeals decision in Center for Auto Safety v. Cox, 580 F.2d 689 (1978), conclusively determined the status of AASHTO as a private interest group which pursues its own special interest agenda. The extent of FHWA reliance upon AASHTO advice and recommendations is almost measureless; for example, the agency's design standards for highways, 23 Code of Federal Regulations Part 625, cites nineteen (19) federally mandated policies, nine (9) of which are simply adopted AASHTO publications, and further cites twenty-one (21) guides and references for highway design, eighteen (18) of which are AASHTO publications. Many of these policies have been adopted by FHWA without open rulemaking or public participation. The Center firmly believes that many decisions which have been made by FHWA solely with the advice of AASHTO have proven to be adverse to public safety and to the cost-effective expenditure of Highway Trust Fund tax revenues.

Since FHWA engages in minimal public notice and comment rulemaking, the only other means of assuring the objective determination of highway safety issues is the FACA. The Section 4 exemption will eliminate the constraints that provide for representation of the public interest viewpoint on highway safety issues, and that prevents the uninhibited operation of secret government.

The tremendous danger presented by this exemption is that committees of state and local government special interests will be able to provide to federal officials the advice and recommendations previously supplied at meetings of the special interest group. These meetings will take place often for the purpose of federal -state-and-local co-authorship of prospective federal regulations long before rulemaking -- if any -- takes place. The public would have no means of monitoring, participating, or responding to the closed meetings that will become everyday events.

The legislative history of the Advisory Committee Act makes clear that advisory bodies too frequently and too successfully represented their constituencies and not the welfare of the general public. Concern was repeatedly expressed that federal officials received advice which could be inappropriately influenced by the vested interests of persons serving on advisory committees. At that time Congress was properly concerned that any one point of view or interest could dominate the discussion so that the committees would not adequately and fairly represent the overall public interest. This would occur with predictable regularity when the advisory body is homogeneous in membership and univocal in its goals. This is particularly true when the dominant group is regulated by, receives funds from, or is most directly involved with or affected by a federal agency and its programs.

It was precisely the undue influence of such special interest groups that the Senate Subcommittee on Intergovernmental Relations intended to eradicate by passage of the Advisory Committee Act.

As Senator Metcalf then stated:

> What we are dealing with, in these hearings, goes to the bedrock of Government decision making. Information is an important commodity in this capital. Those who get information to policymakers, or get information for them, can benefit their cause, whatever it may be. Outsiders can be adversely and unknowingly affected. And decision-makers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings - and could not get in the door if they did - may not make tempered judgments.

S. Rep. No. 92-1098, 92d Cong., 2d Sess. 4 (1972).

Furthermore, the provision presented in the bill creates a number of practical difficulties that are certain to result in future litigation. First, when such meetings are exempt from the requirements of FACA and, therefore, not held pursuant to public notice nor open to the public, and agendas and minutes are dispensed with, the public has no means by which to monitor or assure compliance. There is no feasible means to ascertain that only full-time officers or employees have participated. Second, the phrase "acting in their official capacities" provides only a general, impressionistic definition. This term will be the subject of many lawsuits in gray areas or when a state or local employee acts ultra vires, presuming, of course, that an

adversely affected party could ascertain that the meeting strayed from official duties
in the first place. And third, two parallel systems would be established by this bill. State and local employees "who are required by statute to meet with Federal officers" would be exempt from observance of the FACA, while other state and local employees must adhere to the FACA in order to meet with their federal counterparts where specific statutory language is lacking. This creates an artificial distinction which requires some agencies to abide by, and permits others to ignore, the advisory committee controls. The law is unworkable and will be disregarded.

Mr. Chairman, the Center for Auto Safety is deeply concerned that, although Congress many years ago shut the front door on state and local interest group influence, the exemption in this bill opens a side door through which they will unfairly influence federal decisionmakers and even dominate the character of much federal regulation. For these reasons we are strongly opposed to this provision.

II. Other Key Provisions

S. 444 attempts to improve a number of FACA provisions and emphasizes adherence to practices of open government. Yet, as we reference in our opening remarks, we have reservations regarding some other provisions which fail to resolves basic conflicts inherent in the present law. Although we fully appreciate the significant time and effort that has been expended to date on this legislation, we are convinced that certain issues require further analysis and review.

A. FACA Compliance of Unchartered Committees

First, the exhortations in the bill for greater compliance with the FACA is laudatory. The provisions requiring annual agency reviews to determine applicability and require compliance, Section 10(a)(2), and a parallel requirement authorizing the General Services Administrator to independently engage in such reviews, Section 11(c)(4), are positive measures. But an agency can easily evade these helpful aspects of the bill by conducting mere "paper" reviews of unchartered committees. In such a pragmatic situation, faced with a disagreement or a recalcitrant agency head, the Administrator "may", but is not required to, "notice ... such disagreement ... in the annual summary ...." Section 11(f). Thus, the earlier language has bark, but it has no bite.

In order to provide some teeth to the compliance provisions the Administrator, through the Committee Management Secretariat, should be required to investigate well-founded complaints from the public regarding the existence of unchartered advisory committees. A finding that the complaint is valid should require the Administrator to seek compliance by the agency and should be noticed in the annual report and made available to the public.

In this way, the Administrator would have an initial focus for the review required in Section 11(c)(4), and the interested public would have a means of seeking an informal, institutional resolution to redress of substantiated FACA violations. While this process could significantly reduce the need for litigation over unchartered committees, it is not a substitute for, nor could it serve as a bar to, FACA litigation.

B. Fairly Balanced Membership

The legislation alters the current law on the question of balance in two ways. Section 7(a)(6) endorses a necessary amendment which requires that committee charters include a "plan for achieving a fair balance in committee membership." This provision does not, however, assure that balance is maintained throughout the extended existence of the committee. Section 6(b)(2) leaves to the agencies the power to "prescribe the factors to be considered in achieving balanced membership[.]" Unfortunately, this language will assure that the methods to achieve balance will be tailored to fit a limited range or predetermined membership make-up, particularly with regard to highly technical committees. Furthermore, each agency will develop a distinct set of "prescribed factors" for similar types of committees. That situation will result in confusion and guarantee litigation.

Of greater significance, with regard to balance, is the overarching problem that the bill fails to resolve. It does not provide a manageable yardstick by which balance can either be determined or perpetuated. We admit that this is a thorny issue and not easily decided, but without a legislated standard for agency observance, the term 'balance' will remain an unenforceable ideal.

C. Public Disclosure of Conflicts of Interest

S. 444 grapples with the issue of conflicts of interest but does not propose a viable solution. If there is to be no public disclosure of financial and other interests that may be affected by, or (potentially) conflict with, the work of the committee, then the designation of an agency ethics official (Section 7(a)(7)) is a commendable but meaningless gesture. Furthermore, Section 10(c)(5) establishes a two-tiered ethics system for federal employees and non-federal committee members which does not provide sufficient safeguards.

The legislative intent of the FACA, to assure fairly composed, balanced advisory committees, can only be accomplished through public disclosure of the conflicting interests of all advisory committee members. Public disclosure for these purposes need not be burdensome nor unduly intrusive. It is not too much to ask in the pursuit of open government.

D. Subcommittees or Subgroups

Subcommittees and subgroups must be composed entirely of members of the parent committee. It is thoroughly inappropriate to permit those who are not members of the parent committee to participate on an equal footing with the members of the 'fairly balanced' parent committee. Nor should non-members be appointed to subcommittees so that they may "stack the deck" and dominate the proceedings of the subcommittee. This is of importance whether the subcommittee reports back to the parent committee or directly to the President or agency official. The concept of "balance" is fatally undermined by opening a back door to committee participants who do not have to pass muster under an agency regulation governing technical qualification and conflict of interests.

E. Closure of Meetings

S. 444 eliminates provisions that governed the procedures to be followed for the orderly closure to the public of all or part of an advisory committee meeting. This language appeared in a prior bill, S. 2721, Section 12(e)(2) subdivisions A,B & C. We believe these procedural requirements are necessary and appropriate, and should be restored by appending them to Section 12(e) of the present bill.

III. Responses to Committee Questions Regarding OMB

Although the Center is in favor of strong FACA oversight, the Office of Management and Budget's (OMB) narrow focus on advisory committee "bottom line" figures and quarterly reports is shortsighted. Congressional intent to reduce the large number of committees, from tens of thousands down to manageable levels, has already been accomplished. The other important legislative purpose of the FACA, to ensure fair, open government, is threatened by a simplistic quantitative approach to committee establishment and utilization. Preconceived numerical reductions mandated by fiscal concerns, without regard to agency purpose and need, will have a chilling effect and will produce undesirable results. First, this will force advisory committees underground and increase illegal utilization in order to evade more burdensome management strictures. This will thwart the Congressional intent underpinning the statute. Second, increased reliance upon outside private consultants not only raises the potential for an explosion of private interest group influence on federal decisionmaking, it will doubtless become a growth industry which will, in short order, far exceed the cost of the voluntary advisory committees they replace. Finally, the OMB bulletin's direction in Section 6(C) to reduce committee "personnel and other overhead costs as much as possible" may be in conflict with the statutory requirement that advisory committees shall have adequate staff, quarters, and funds to meet necessary expenses. FACA, Section 5(b)(5), and S. 444, Sections 6 and 7.

The Center is willing to discuss these positions with Committee staff at your convenience.

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April 12, 1989

Senator John Glenn, Chairman
Senate Committee on Governmental Affairs
Dirksen Senate Office Building Room 346
Washington, D.C. 20515

Dear Senator Glenn,

At the March 15, 1989 hearing on S. 444, you requested my views regarding coverage of meetings by the Federal Advisory Committee Act (FACA). In particular, your questions addressed the number of persons that may attend a meeting without violating the FACA. I wish to supplement my testimony with the applicable case law on this issue.

Two D.C. Federal District Court cases are relevant to this point. First, in Nader v. Baroody, 396 F. Supp. 1231 (1975), the court held that the FACA does not apply to meetings that do not involve a "request for specific recommendations on a particular matter of governmental policy." Id. at 1234. This reflects the federal judiciary's common-sense application of FACA. The law applies to meetings from which the government intends to obtain advice and recommendations regardless of the number of attendees. But the courts have not interpreted the FACA to cover meetings which are not convened for the purpose of providing advice on specific subjects, casual and informal contacts, or wholly unsolicited advice whatever the source.

More recently, in NRDC v. Herrington, 637 F. Supp. 116 (1986), the court ruled that even a formally convened group may not be an advisory committee under the FACA when only individual advice of the participants, as opposed to advice formulated by the group, is sought.

These two opinions (copies enclosed) reveal that the Federal Courts do not interpret the FACA to apply to all meetings, nor even to all meetings at which advice and recommendations are provided. They also point out that FACA is not mechanically applied to meetings based upon the number of participants. I hope this is of assistance in further response to your question, and I would ask that this letter and the enclosed cases be made part of the hearing record.

Sincerely,

Henry M. Jasny

Enclosures

STATEMENT BEFORE THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS ON S. 444, THE FEDERAL ADVISORY COMMITTEE ACT AMENDMENTS OF 1989

BY **ALEX NAIMON**
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April 10, 1989

Thank you for your invitation to submit written comments on S. 444, the Federal Advisory Committee Act Amendments of 1989, the successor bill to S. 2721 in the 100th Congress.

While the significant attention your Committee is focusing on FACA is praiseworthy, my conclusion on balance is that enacting S. 444 in its current form would do more harm than good.

I start from our joint premise that the present FACA is one of the bulwarks of open, accountable government and participatory democracy in the administrative process. Federal advisory committees (FACs) have the potential to expand the policy horizons of federal agencies, expose federal officials to new knowledge, increase the range of potential responses to significant issues, and afford a flexible basis for agencies to change or alter established policies.

The FACA process envisages that the government will receive the best advice possible from an open dialogue of a balanced group of outside experts. FACs are open to the public, who have a right to make presentations at the meeting and to obtain copies of detailed minutes of all meetings, including a description of all policy options considered.

Two principal factors disturbed this set of idyllic open government arrangements, providing a proper basis for revising

FACA: (1) the evasion of the open government provisions of FACA by the failure of FACs to file charters; and (2) the failure to achieve the required balanced membership of FACs. A third disturbing factor was the arbitrary manner in which the GSA, during the Reagan Administration, interpreted FACA. For example, the GSA interpreted a requirement for "fair compensation" to FAC members to mean "no compensation," and interpreted the provision calling for "consultation with" the GSA before establishing FACs to require the prior approval of GSA. While the start of a new Administration may presage a return to more rational dialogue on FACA within the Executive Branch, it does not provide sufficient basis for disregarding FACA's careful statutory scheme and setting up a different one. Nor does it furnish a basis for presuming that officials of future Administrations will necessarily emulate the current rational dialogue on FACA, rather than return to the previous unsatisfactory posture of the Reagan Administration. As I suggested in my testimony last year on S. 2721, Congress should take the initiative to clarify ambiguities by statute, rather than rely on the ephemeral and sometime arbitrary nature of GSA and other Executive Branch interpretations.

My over-arching conclusion is that the weakness in the administration of FACA during the last Administration derives not so much from defects in the statutory text of FACA as from some agency officials wanting to have the benefits of a FAC without the concomitant burden of meeting FACA requirements: specifically, advisory committees must comport themselves as such by being chartered, and memberships on FACs must be balanced both in terms of the functions to be performed and the points of view represented. But what happened to the remedying of these deficiencies in the administration of FACA? The natural legislative proposal growing out of the events of the mid-1980s under which Congress would resolve the three issues discussed above -- all caused by errant Executive Branch behavior -- was "intercepted" by Executive Branch adherents. The legislative proposal in S. 455 not only does not emanate from the adverse experience with FACA administration, but is ploughing new ground following its own independent path.

While S. 444 contains the requirement that FACs have a balanced membership, and in fact reiterates the requirement in the definition of "advisory committee," this mere assertion of the requirement is not a sufficiently objective or definitive standard as will prevent agencies from "stacking the deck" instead of balancing the interests concerned. Quite often in the last eight years, balanced membership was not achieved, e.g., the Pornography Commission, the initial AIDS Commission, and the Quadrennial Commission. Greater Congressional scrutiny and oversight is needed, and enactment of the administrative requirement in effect during the Carter Administration -- that every FAC have a consumer representative -- would be helpful, since there is always a consumer or general public interest in all Federal programs. The fact that a consumer member is no longer required on FACs is ample evidence that a statutory change is needed to effect such representation on a long-term basis.

What is done to agencies that fail to charter committees that are in fact "advisory committees" within the meaning of FACA? So far, not much. The Congress could hold oversight hearings to call the transgressor agency to account, as your Committee did, under Senator Levin's leadership, in the case of the SDI Organization in April 1988. But, Section 8 of S. 444, in listing the responsibilities of Congressional committees, says nothing about Congressional committees reviewing the activities of advisory committees to determine whether they are FACs subject to FACA. Section 10, Additional Responsibilities of Agency Heads, and Section 11, Responsibilities of the GSA Administrator, do provide for the review of advisory groups to determine if they are subject to FACA. There is no requirement, however, that agencies inform the GSA that an advisory group is being established, so that the GSA can make a Section 11 determination; nor is there any similar requirement so that an agency can make such a determination under Section 10. Furthermore, GSA lacks the necessary clout to assure compliance with the spirit of open government that underlies FACA, as abundantly evidenced by the colloquies among Mr. Weiss and Mr. Dean for GSA, and Senators Levin and Glenn, appearing on pp. 23-25 of your October 5, 1988 hearing, concerning DOD's and the SDI Organization's continuing failures to comply with FACA.

An important and possibly the most questionable provision in S. 444 is its exemption from the application of FACA for committees of state and local government officials and employees who are required to meet with Federal officials regarding shared programs, e.g., grant-in-aid programs. These programs involve vast expenditures by the federal government on behalf of the large number of grant-in-aid program beneficiaries, particularly the disadvantaged, all of whom will be locked out of those committee meetings by reason of this exemption. The suggested rationale for this exemption is that it would facilitate action in emergencies; but shared federal-state programs do not lend themselves to hasty action, and these programs are the very type of program where the principles of open government and balanced membership need to apply. Were this exemption proposed as a change in an agency regulation, it would elicit manifold responses from grant-in-aid recipient groups. It would be an unfortunate irony if this exemption crept into enactment because observers assumed that there are no significant differences between S. 2721 (which didn't include this exemption), and S. 444.

S. 444 substitutes for the current Congressional standard for establishing new FACs, "their number should be kept to the minimum necessary," the new standard, "only when the information to be obtained is not already available through another advisory committee or source within the federal government" (emphasis added). FACA contemplates, however, that advisory committees will be established for many creative purposes, not just to obtain new information. To preclude the establishment of a proposed advisory committee because the information it would address is already available within the federal government does not take into account the benefits accruing from the crossfertilization of ideas by outside experts with different backgrounds and perspectives, using information already available to the federal agency concerned.

Concerning the financial disclosure responsibilities of members of advisory committees, in which Chairman Glenn has indicated a special interest, I believe all prospective members of FACs should be required to submit to the agency soliciting their services a general listing of their financial interests, with no need to disclose the value of each such interest; upon appointment of these members, such a listing should be made available to the public upon request. It would be unfair to the agency concerned before making the appointment, and to the public afterward, not to be aware of the areas in which FAC members have financial interests. This simplified financial disclosure reporting requirement is needed to enable the public to judge members' recommendations in light of their financial assets and affiliations; it would be a reporting requirement separate and apart from the financial disclosures required of federal employees under the Ethics in Government Act. Since neither FACA nor S. 444 currently contain a separate financial disclosure reporting requirement for members and prospective members of FACs, this skeletal reporting requirement should be enacted as part of FACA, whether in S. 444 or another bill. This would assure that at least skeletal financial information as to assets and affiliations (but not amounts) would be reported by non-federal employee members of FACs. This was also the thrust of

Senator Pryor's Opening Statement on p. 3 of the October 5, 1988 Hearing.

As noted above, some federal employees and Special Government Employees already must file financial disclosure forms under the Ethics in Government Act, as interpreted by the Office of Government Ethics. S. 444 provides that the appointing authority for each FAC must indicate whether members shall be appointed as federal employees, or as representing the views of non-Federal interests. It is noted that such indicated distinctions between Special Government Employees (SGEs) and non-Federal employees made by S. 444 neither adds nor subtracts a financial reporting requirement, such as I recommend above.

Under 18 U.S.C. § 208, an SGE is prohibited from participating in his official capacity in a "particular matter" in which the employee or someone close to him or her has a financial interest, absent a waiver obtained from the employing agency. S. 444 provides for the respective appointment authority to affirmatively indicate to members appointed to FACs whether they are to be appointed as SGEs subject to the Ethics in Government Act, or as representatives of non-Federal interests, not subject to such Act. But to stop there, as S. 444 does, in respect to dealing with disclosures of financial interest of all FAC members, including non-Federal employees, is inapt. Basic financial information about all members' assets and affiliations, not necessarily including amounts held, should be reported to the agency concerned and made available to the public on request. This would not only buttress the integrity of the FAC and of the agency, but would also enable the agency and the public to more intelligently evaluate their recommendations. Accordingly, I would recommend substitution of "all members" for "those members who are Federal employees" in Section 9(c)(2)(B), if S. 444 is approved.

FACA defines "advisory committee" to include "any subcommittee or other subgroup thereof" without defining the term "subcommittee or other subgroup thereof." Section 3.(3) of S. 444 on the other hand defines "subcommittee or other subgroup" to include any group established by a committee "(regardless of whether its members are drawn in whole or in part from the parent committee)." This is an inconsistency in terms, as it contemplates persons being members of a subcommittee who are not necessarily part of the parent committee. As brought out in your Committee's April 19, 1988 Hearing on DOD/SDI Organization Compliance with FACA, the "regardless" phrase in this definition amounts to a subterfuge for evading the balanced membership requirement of FACA. The April 19, 1988 Hearing also notes the evasion of FACA's balanced membership and open government provisions by the SDI Organization contracting with educational institutions to furnish a whole study panel or task force not subject to FACA or other guidance applicable to Federal entities, instead of forming a FAC within the SDI Organization subject to FACA.

It is hard to visualize how disclosure of any of the items of information to be included in the President's summary report, set forth in Section 9(d)(1)(A)-(I), could be information that could be withheld for reasons of national security. Similarly, the provision in Section 10(d)(4) authorizing agency heads to withhold information from the annual report for reasons of national security is questionable.

General Observations

While no one favors unnecessary or wasteful Federal expenditures for advisory committees or any other purpose during this time of huge budget deficits, there has been a preoccupation within much of the Executive Branch during the 1980s with the cost of advisory committees, while overlooking or paying too little attention to the enormous benefits to the country accruing from the activities of FACs. Less than $100 million annually[6] is spent on all FACs, while more than $2.5 billion is spent annually for consultant services for management and professional services in the Defense Department alone.

In sum, I agree with Senator Levin that it is important that we keep track of advisory committees to ensure that they are operating fairly and openly, with proper attention to the public treasury. I agree also with Senator Glenn's Opening Statement in the Committee's Hearing on October 5, 1988 that there is general consensus on what the problems are under FACA, and as many proposed solutions as there are commentators. Where I part company as one such commentator is with the solutions proposed in S. 444 (or S. 2721). The solutions embodied in S. 444 and S. 2721 do not sufficiently represent Congressional leadership, but rather reflect Executive Branch influence over an area of policy-making which should be dominated by the Congress. A distinguished Constitutional lawyer recently referred to the situation as "Legicide." You can do better.

(Alex Naimon is a long-standing Member of the Federal Bar Association's Select Committee on FACA)